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SCOTLAND.

REPORTS OF CASES

DECIDED IN THE

COURT OF COMMON PLEAS,

BY

GEORGE FREDERICK HARMAN,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

CHRISTOPHER ROBINSON, Q.C.,

EDITOR.

VOL. XXX.

CONTAINING THE CASES DETERMINED
FROM EASTER TERM, 42 VICTORIA, TO HILARY TERM, 43 VICTORIA,
WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

TORONTO:
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JUDGES
OF THE
COURT OF COMMON PLEAS.

DURING THE PERIOD OF THESE REPORTS.

THE HON. ADAM WILSON, C. J.
" " THOMAS GALT, J.
" " FEATHERSTON OSLER, J.

Attorney-General :
THE HON. OLIVER MOWAT.

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REPORTS OF CASES IN THE COURT OF COMMON PLEAS.

EASTER TERM, 42 VICTORIA, 1879.

(*May 19th to June 7th.*)

In Michaelmas Vacation, on 14th January, 1879, the Honourable JOHN WELLINGTON GWYNNE, heretofore a Puisne Judge of the Court of Common Pleas, was appointed a Puisne Judge of the Supreme Court of Canada.

In Hilary Vacation, on 5th March, 1879, FEATHERSTON OSLER, Esquire, of Osgoode Hall, Barrister-at-Law, was appointed a Puisne Judge of the Court of Common Pleas, in the place of the Honourable JOHN WELLINGTON GWYNNE, appointed a Puisne Judge of the Supreme Court of Canada.

Present :

THE HON. ADAM WILSON, C. J.
“ THOMAS GALT, J.
“ FEATHERSTON OSLER, J.

THE CANADA PERMANENT LOAN AND SAVINGS COMPANY
v. PAGE.

Evidence—Registry Act—Mortgage—Certificate of registration—Proof of execution.

Held, that the production of the registered duplicate original of a mortgage with the registrar's certificate endorsed thereon is *prima facie* evidence of the due execution of such instrument.

Ejectment to recover the west half of lot 7 in the 7th concession of the township of Cambridge.

The plaintiffs claimed title under a mortgage from the defendant.

The defendant defended for whole of land, but filed no notice of defence.

The cause was tried before Armour, J., without a jury, at L'Orignal, at the Spring Assizes of 1879.

At the trial the plaintiffs produced the duplicate original of the mortgage from the defendant to the plaintiffs, dated 27th November, 1876, filed in the Registry Office, with the Registrar's certificate endorsed, without any further proof of the execution, and contended that under R. S. O. ch. 111, sec. 56, the certificate was *prima facie* evidence of the due execution of the mortgage.

The learned Judge was of opinion that the execution of the mortgage had not been proved; and he entered a verdict for the defendant, but reserved leave to the plaintiffs to move to have a verdict entered in their favour.

In this term, May 19, 1879, *Beverley Jones* obtained a rule *nisi* to shew cause why verdict for the defendant should not be set aside and a verdict entered for plaintiffs, pursuant to the leave reserved, and under the Common Law Procedure Act.

During the same term, May 28, 1879, *F. J. Joseph* shewed cause. The certificate of registry is for the purpose of shewing priority of registration; and from the wording of the former Act, Consol. Stat. U. C. ch. 89, it is apparent that sec. 56 of R. S. O. ch. 111, could not have the construction now sought to be put upon it. The making the deed *prima facie* evidence without notice under R. S. O. ch. 62, secs. 45 and 46, would be a great hardship on the defendant, and which the statute did not intend to impose. [WILSON, C. J.—Is it not similar to the position of a defendant in the case of a protest of a note being produced as *prima facie* evidence of presentment and notice?] No; the protest is merely *prima facie* evidence of a certain official act similar to the certificate of the Registrar being *prima facie* evidence of the due registration.

Beverley Jones, contra. From an examination of the course of legislation it is quite apparent that the Legislature intended the certificate of registration on the duplicate to be *prima facie* evidence of execution. By the Consol. Stat. U. C. ch. 89, sec. 30, the Registrar is required to sign the certificate when endorsed, which certificate is to be evidence of registration. In *Doe dem. McLean v. Manahan*, 1 U. C. R. 491, it was held to be *prima facie* evidence, while prior to that case it was held to be conclusive evidence : *Russell v. Gillett*, (Michaelmas Term, 3 Vic.); see *Doe dem. Crookshank v. Humberstone*, Hil. Term, 4 Vic. By 29 Vic. ch. 24, sec. 53, (1865), which was the first Act requiring instruments to be registered in full, the certificate on the duplicate was merely made evidence of registry ; and by sec. 52 of that Act certified copies of originals might be used in evidence *on notice* being given of the intention to do so. By sec. 50 of that Act copies of powers of attorney were *prima facie* evidence without notice. Under the Act, therefore, a copy of a deed was thus made *prima facie* evidence of execution *on notice* having been given ; but a copy of a power of attorney was made *prima facie* evidence of execution without notice. The Registrar's certificate on the original registered instrument was merely evidence of registration. The Act 31 Vic. ch. 20, (1868,) was then passed whereby a copy of the power of attorney, which by the Act of 1865, 29 Vic. ch. 24, was declared should be *prima facie* evidence of execution, was limited by sec. 49 to cases where notice had been given, and the anomaly was removed of the holder of a duplicate original, when he desired to prove his mortgage, having to get a certified copy from the Registry office and give notice, it being enacted by sec. 53, which corresponds with R. S. O. ch. 111, sec. 56, that the duplicate original should be *prima facie* evidence of registration and due execution. See also R. S. O. ch. 150, sec. 38. In the cases cited, in *Taylor on Evidence*, 7th ed., vol. 3, p. 1373, it was held on similar enactments that the certificates of the officials were *prima facie* evidence of certain facts therein

contained. *Kelly v. Morray*, L. R. 1 C. P. 667, is also in point. It is no hardship on the defendant, as he is able to deny on oath the execution of the instrument, which removes the *prima facie* presumption of its execution raised by the certificate.

May 28, 1879. WILSON, C. J., delivered the judgment of the Court.

We think the rule must be made absolute. By the Act of 1865, 29 Vic. ch. 24, sec. 50, a certified copy of a power of attorney is made *prima facie* evidence of the due execution of the power without notice, but the certificate of the Registrar on the original registered instrument is merely made evidence of registration, and not of the execution.

The Act 31 Vic. ch. 20, O., was then passed, and two important changes are effected. Sec. 49 provides that a copy of a power of attorney shall be *prima facie* evidence only on notice being given; while by sec. 53 the Registrar's certificate on the duplicate original instrument is made *prima facie* evidence of the execution of such original.

We think, therefore, that the production of the duplicate original instrument with the Registrar's certificate endorsed thereon, must be deemed to be *prima facie* evidence of the due execution of such instrument.

We do not see that this is any serious hardship to the defendant. He knows that he is being sued on his mortgage. He can, if the instrument be not executed by him, go into the witness box and displace the *prima facie* proof by a denial of the execution.

The rule will be absolute to enter a verdict for the plaintiffs.

Rule absolute.

WRIGHT V. CREIGHTON.

Ejectment—Amendment by adding co-plaintiffs having adverse title—Powers of arbitrator—A. J. Act—Motion to set aside order.

In ejectment plaintiff claimed as assignee of M. of a mortgage made by C., and the substantial defence was that the mortgage had been paid, or, if not, that the defendant should be allowed to redeem. At the trial the cause, by consent, was referred to an arbitrator with the powers of a Judge at Nisi Prius, as to adding parties, &c. After the reference had been entered upon it was discovered that there had been a previous assignment to E. W. and J. W., whom, although their title was adverse to the plaintiff, on their consenting thereto, and after notice to defendants, the arbitrator ordered to be added as co-plaintiffs. On motion by the defendant to set aside the order, but without shewing that he was in any way prejudiced thereby:

Held, by OSLER, J., that under the A. J. Act, 36 Vic. ch. 8, O., R. S. O. ch. 49, the arbitrator had power to make the amendment, and that it was properly made, as it caused complete and final justice to be done in the action.

Held, also, that even if, under the circumstances, the amendment was improper, the motion should have been to revoke the submission.

Ejectment to recover certain land in the town of Owen Sound.

The plaintiff claimed title as the assignee of a mortgage made by one Abraham Creighton to one John P. Mason.

The defendant claimed title: 1. As grantee of one John P. Mason. 2. By length of possession. 3. On equitable grounds, that there was a payment of the mortgage to John P. Mason while he was the holder thereof. 4. That the defendant offered to redeem on payment of whatever might be due on the mortgage.

At the trial the case was, by consent, referred to Henry Macpherson, Esquire, Judge of the County Court of the County of Grey, "to consider the matters in difference between the parties herein, and to take an account of what, if any, there is due to the plaintiff on account of the mortgage in the plaintiff's notice of title mentioned." The consent order also provided that the arbitrator should have "all the powers as to certifying, amending pleadings, adding parties plaintiffs or defendants, and otherwise, as a Judge at Nisi Prius."

After the reference had been entered upon, it was discovered that before the assignment of the mortgage to the

plaintiff an assignment of it had been made by John P. Mason to one Wm. J. Mason, who had assigned it to Edwin Wright and Joseph Wright, the latter being the husband of the plaintiff. Written consents, duly verified, were given by Edwin and Joseph Wright to be added as parties plaintiffs, and the arbitrator, after notice to the defendant, made an order, in pursuance of the powers conferred upon him by the submission, adding them as such parties.

On May 23rd, 1879, *B. E. Bull* obtained a rule *nisi*, calling upon the plaintiff to shew cause why the order of the arbitrator should not be set aside, on the ground that he had no power to add, and ought not to have added, Joseph Wright and Edwin Wright as plaintiffs; that, inasmuch as Edwin Wright and Joseph Wright claim by title adverse to the said Charlotte Wright, they should not have been added as co-plaintiffs with her.

No affidavit was filed to shew that the defendant would be prejudiced, or that any injustice would be done, by the amendment.

June 3, 1879. *Aylesworth* shewed cause. The order cannot be moved against in this manner. The only way is by motion to set aside the award. There was jurisdiction to make the order. Even if the power was not conferred under sec. 222 of the C. L. P. Act, R. S. O. ch. 50, sec. 270, it is clearly conferred under the A. J. Act, R. S. O. ch. 49, under which third persons may be added as parties where by doing so complete and final justice may be done in the suit. He referred to *Blake v. Done*, 7 H. & N. 465; *Ogilvie v. McRory*, 15 C. P. 557; *Henderson v. White*, 23 C. P. 78; *Trustees of Ainleyville W. M. Church v. Grewer*, 23 C. P. 533.

B. E. Bull, contra. The application is properly made. This is the only way that the objection can be taken to the course pursued by the arbitrator. There was no power to make the amendment. No such power is conferred by the 222nd section of the C. L. P. Act: *Robinson v. Bell*, 9 C. P. 21; *Mitchell v. Smellie*, 20 C. P. 389; *White v. McKay*,

43 U. C. R. 226. Sec. 26 of the Ejectment Act, R. S. O. ch. 51, expressly limits the trial to the rights of the parties to the record. The A. J. Act cannot be held to confer the power contended for.

June 6, 1879. OSLER, J. (a)—If the amendment was one which the arbitrator ought not to have made, or was one likely to be injurious to the defendant, he should have moved for leave to revoke the submission, and not to set aside the order complained of, which is strictly within the power conferred upon the arbitrator by the submission, and if I could see that the defendant was in fact likely to sustain any practical injustice, I would now permit the rule to be amended.

It is clear that the action might have been commenced by all the present plaintiffs, although the title of each is wholly inconsistent with and repugnant to that of the other.

The question to be tried in the action of ejectment is, whether the statement in the writ of the title of the claimants is true or false; and, if true, then which of the claimants is entitled, and whether to the whole or part, and if to part, then to which part of the property in question; so that the verdict is, as has frequently been held, divisible, both as to the lands claimed and the parties to the suit: *Bradley v. Terry*, 20 U. C. R. 563; *Wilson v. Baird*, 19 C. P. 98.

Under the Common Law Procedure Act, secs. 63, 65, R. S. O. ch. 50, secs. 74, 76, there was no power to strike out all the names in a summons in ejectment and substitute a new set therefor after the entry of the record for trial, nor would such an amendment as the one just referred to, that which was made in this action, have been made under section 222, (R. S. O. ch. 50, sec. 270,) as being an amendment necessary for the purpose of determining in the existing suit the real question in controversy between the parties: *Robinson v. Bell*, 9 C. P. 21. And in the case of *Mitchell v. Smellie*, 20 C. P. 389, Mr. Justice Gwynne

(a) Argued during term before OSLER, J., alone.

refused to permit an amendment in an action of ejectment by adding another plaintiff, whose title was inconsistent with that of the plaintiff on the record as originally framed. Such an amendment would, in that particular case, have been productive of injustice; but the observations of the Court shew that they considered that it would have been improper under any circumstances as the law then stood.

But the powers of amendment which have been conferred upon the Court by the Administration of Justice Act, 36 Vic. ch. 8, R. S. O. ch. 49, are much more extensive than those which they formerly possessed, and for the purpose of causing complete and final justice to be done in all matters in question in any action at law, the Court or Judge may, according to the circumstances of the case, at the trial, or any other stage of the action, make such order or decree as the equitable rights of the parties respectively require, and may add third persons as parties to any proceedings, strike out parties, treat parties named plaintiffs as defendants and vice versa, direct enquires to be made and accounts taken, and as fully dispose of the rights and matters in question as a Court of Equity could.

The substantial defence here is, that the defendant has paid the mortgage in question, or, if not, that he is ready and willing to do so, and thereupon he asks to be admitted to redeem. If he had, instead of waiting to be sued by one of the parties claiming to be assignee of the mortgage, filed a bill for redemption, it would have been necessary for him to bring the rival claimants before the Court, and the rights of all parties would have been disposed of in the same suit.

This is exactly what the Administration of Justice Act now permits to be done in an action at law, and by making the third parties here claiming to be assignees of the mortgage sued upon, plaintiffs or defendants, the object of the Act will be attained, and complete and final justice done between all parties in this action.

The order might have been made at the instance of the defendant, as well as of the original plaintiff; and in either case seems to be one which is really for his benefit.

The learned arbitrator has reserved the question of the costs connected with the amendment until the making of his award, and as it appears to me to be an amendment which is not likely to be productive of injustice, but the contrary, I discharge the rule. Costs to be costs to the plaintiffs in the cause.

Rule discharged.

BRILLINGER V. THE ISOLATED RISK AND FARMERS' INSURANCE COMPANY.

Insurance—Pleading—Departure—Statutory conditions.

The second count of a declaration, after alleging that it was on a fire insurance policy for \$1,000, dated 28th May, 1877, which by its terms was said to be subject to certain pretended conditions endorsed thereon, and set out at length in the first count, averred that the policy was one entered into, and in force in Ontario, with respect to property situate therein, and that the said conditions were the only conditions stated in said policy, and were not, nor were any of them, conditions mentioned in, or in conformity with, the Fire Insurance Policy Act, nor variations thereof, as required by said Act, whereby the conditions so endorsed upon the policy were inoperative and void, and the policy was free from all conditions as against the plaintiff.

The fifth and sixth pleas alleged that the policy was subject to the conditions in the words and figures following: Setting out conditions, in the exact terms of statutory condition No. 13, with respect to proofs of loss, and averred non-performance by omitting respectively to give notice of loss forthwith, and to deliver a statutory declaration that the loss was just and true, &c. To these pleas plaintiff replied respectfully, setting up grounds of excuse for the non-performance of the said conditions.

Held, by OSLER, J., replications bad, as being a departure from the declaration; but that the pleas were also bad, for that they must be read as alleging that the policy was subject to the conditions set out in the pleas, being the statutory conditions, without shewing that they were endorsed upon the policy, or were of the character referred to in *Geraldi v. Provincial Ins. Co.*, 29 C. P. 321.

DECLARATION. Second count: upon a policy of insurance dated 28th May, 1877, for three years, for \$1,000, namely

for \$200 and \$800 respectively, on the contents of a dwelling-house and barn, which said policy, by its terms, was said to be "subject to certain pretended conditions endorsed on the said policy, and which are declared to be a part of the said policy, and which are the only conditions set out upon the said policy, and are set out at length in the first count." The count then proceeded to aver that the policy was a policy of fire insurance entered into and in force in the Province of Ontario, with respect to property situate in such Province, and that the said conditions so endorsed upon the policy are the only conditions stated in the policy, and are not, nor is any of them, a condition mentioned in the "Fire Insurance Policy Act," or in conformity with any of the statutory conditions mentioned in or provided for in the said statute; and that to the policy have not been added in conspicuous type and in ink of a different colour, words to the effect in the 4th section of said statute, and by said statute required to be added to a policy of fire insurance entered into or in force in said Province when it is desired to vary or omit any of the statutory conditions, or to add new conditions, or a new condition other than the statutory conditions, whereby the conditions so endorsed upon the said policy are inoperative and void, and of no effect in law, and the policy is free from all conditions as against the plaintiff. The declaration then alleged a loss by fire of the contents of the said barn, and that the defendants, although required so to do, have not paid the amount of the loss to the plaintiff.

To this count the defendants pleaded the following pleas:

Fifth plea : That the policy in the said second count mentioned was subject to the conditions in the words and figures following, that is to say—setting out conditions with respect to notice, proofs of loss, &c., and averring non-performance by omitting to give notice in writing of the loss forthwith after the loss.

Sixth plea, setting out the same conditions, and averring a non-performance by omitting to deliver a statutory declaration that the loss was just and true, &c.

The conditions set out in these pleas are in the exact terms of condition 13 of the Fire Insurance Policy Act.

To the fifth plea the plaintiff replied, averring that the policy is subject to the Fire Insurance Policy Act: that he did in good faith give notice of the loss in writing, and that it was by mistake that such notice was not given forthwith, &c.

The second replication to the same plea averred that the omission to give notice was by mistake, and without any intention to defraud or deceive the defendants.

To the sixth plea the plaintiff, after in like manner averring that the policy was subject to the Fire Insurance Policy Act, averred that as soon after the loss as practicable he delivered proof of loss in pursuance of the condition pleaded, and the defendants objected to them upon other grounds than of an imperfect compliance with the conditions.

The plaintiff also replied to the sixth plea, after also alleging that the policy was subject to the Fire Insurance Policy Act, that the defendant did not within a reasonable time notify the defendants in what respect the proofs of loss delivered were defective.

To these replications the defendants demurred, on the grounds: That each of them is a departure from the declaration; and that the plaintiff seeks to excuse, under the provisions of the Fire Insurance Policy Act, his neglect or omission to give notice to the defendants forthwith after the said loss, pursuant to the terms of the conditions pleaded in the pleas, while in the said second count the plaintiff avers that the said policy is free from all conditions against the plaintiff.

The defendants also excepted to the fifth and sixth pleas, because they admit that the policy had not endorsed upon it the statutory conditions under the Fire Insurance Policy Act, and therefore cannot set up that it was subject to any such conditions as those set out in the pleas.

May 23, 1879. *J. A. Paterson*, for the plaintiff.
J. K. Kerr, Q. C., for the defendants.

The following authorities were referred to: *Walker v. Kelly*, 24 C. P. 174; *Geraldi v. Provincial Ins. Co.*, 29 C. P. 321.

May 27, 1879. OSLER, J. (a)—The replications are bad for the reasons assigned in the demurrer. The plaintiff declares upon a contract without any conditions. The defendants plead that it was subject to certain conditions which they set out, and the plaintiff, instead of taking issue, admits by his replication the truth of the pleas, and excuses the non-performance of the conditions. He thus puts his case upon a new ground wholly different from that which he sets up in the declaration, in other words, is guilty of a departure.

Then as to the exceptions to the pleas. The defendants contend that as the Fire Insurance Policy Act does not require that all the terms of the insurance contract shall be embodied in the policy, it is competent to the parties to make an agreement expressly adopting any conditions or imposing any conditions they please; in short, that the object of the Act is only to prevent insurance companies imposing conditions on granting a policy which the insured has not expressly agreed to be bound by. And it is urged that the pleas excepted to are framed for the purpose of raising this question. The case of *Geraldi v. Provincial Ins. Co.*, 29 C. P. 321, is referred to in support of the defendants' contention on this point.

The condition in question in that case, however, was that no insurance should be considered binding until the actual payment of the premium; and it was held that such a condition was not governed by the statute relating to statutory conditions of insurance or their variations. It was a condition which related to a precedent act to be done without which there was to be no contract.

Such a condition is very different from the one set up in these pleas. The latter is one of the very conditions provided for by the Act. Then in what way does the plea answer the declaration? The latter expressly avers that

(a) Argued during term before OSLER, J., alone.

there is no such condition endorsed upon or contained in the policy. The Act expressly requires it to be printed upon the policy under the heading "statutory conditions." The language of the plea is "that the said policy was subject to the conditions in the words following," &c., not averring that they were printed upon the policy, in which case the pleas might have been supported as informal traverses of the averments in the declaration that the policy was without conditions.

It is argued that the pleas must be read as if they stated an express agreement between the parties that the plaintiff should perform the acts stipulated for by the alleged "condition" before the sum insured should be payable.

But I think the answer to this construction is, that the matter is not set up as one of contract or agreement. The language of the plea is, that the policy was subject to the *conditions* set forth, a word which aptly describes a something imposed by the company upon the insured, and one of the matters provided for by the Fire Insurance Policy Act.

I do not see that I can read this plea as averring that an express contract or agreement had been entered into between the parties, by which the plaintiff covenanted, contracted or agreed that before the sum insured should be payable, he would perform and do the matters set forth in the pleas. If that is the position of the parties the plea should have been differently framed, and the plaintiff's express contract or agreement averred in equitable terms. Without importing into the pleas something which I do not find there, I can only read them as alleging that the policy was subject to the conditions pleaded without shewing that they in any way appeared upon the policy, or were conditions of the nature of the one under consideration in the case of *Geraldi v. Provincial Ins. Co.*, 29 C. P. 321,

The judgment will therefore be for the defendants on the demurrers to the replications, and for the plaintiff on the exceptions to the pleas.

Judgment accordingly.

**REYNOLDS V. THE CORPORATION OF THE COUNTY OF
ONTARIO.**

County board of auditors—Audit of.

To an action for the recovery of fees for services connected with the administration of justice within defendant's county, claimed to have been rendered by the plaintiff as sheriff, alleging that such fees had been duly audited by the county board of auditors under the statute, whereby the plaintiff became entitled to receive payment of the same, the defendant pleaded on equitable grounds, setting up that the right to such fees had been disputed and submitted to the Court of Queen's Bench, by a special case, and that the alleged audit was made under a misconception of the judgment which the auditors erroneously understood to decide that the plaintiff was entitled to such fees, whereas the decision was to the contrary.

Held, affirming the judgment of Cameron, J., plea good, for that the facts stated therein would constitute a good defence to the action, because it appeared that the fees had not been duly audited, and this was a pre-requisite to the plaintiff's right to recover.

THIS was a re-hearing of the judgment of Cameron, J., on demurrer, reported in 29 C. P. 488.

The plaintiff in his declaration alleged, that he rendered divers services connected with the administration of justice within the County of Ontario, as sheriff, and his account for fees for such services was duly rendered to the proper officer, and was duly audited and allowed by the auditors composing the board of audit for the county, in accordance with the statute in that behalf, at the sum of \$5,654.88; and thereupon the plaintiff became entitled to receive and be paid the said sum out of the funds of the county in preference to all other charges, under the statute in that behalf, and duly demanded payment thereof from the defendants and their treasurer, who have neglected and refused to pay the same.

Fourth plea: On equitable grounds, in substance, that the plaintiff's claim is for certain fees for summoning grand and petit jurors for the county, from the year 1856 to the year 1868, which fees the defendants allege are not legally payable, and they instructed the board of audit not to allow the same, and the said board of audit refused to allow the same when the claim was presented by the plaintiff:

that the plaintiff, in order to test his right to the fees so claimed, applied to the Court for a mandamus to compel the auditors to audit and allow the said claim, and that upon the return of the rule *nisi*, by the agreement of the parties, a special case was submitted for the opinion of the Court of Queen's Bench, and upon the said case the said Court gave judgment to the effect that the plaintiff was not entitled to the fees claimed in this suit; that thereupon the plaintiff applied to the auditors, presenting them with a copy of the judgment of the Court, and representing that the judgment was in the plaintiff's favour, and the auditors, accepting this view of the judgment, allowed the plaintiff's claim without in effect exercising their own judgment thereon.

To this plea the plaintiff demurred, on the grounds that it disclosed no defence; that the audit when made being conclusive under the statute, the motives or reasons which caused the auditors to audit and allow the plaintiff's claim cannot be enquired into, or their decision be reversed,

In this term, May 27, 1879, the judgment was reheard.

Hector Cameron, Q. C., for the plaintiff. The learned Judge based his judgment on the 40 Vic. ch. 8, sec. 45, O., R. S. O. ch. 65, sec. 10, as not making the audit conclusive, but this Act does not apply, as the audit took place before its passing. *Re Sheriff of Lincoln*, 34 U. C. R. 1, clearly shews that the audit is conclusive. There it was held that the sheriff's account against the county is payable as soon as audited by the county board of audit, and the county treasurer is not justified in withholding payment until the account has been allowed and paid by the Government to the county. In *Re Davidson and Quarter Sessions of Waterloo*, 22 U. C. R. 405, also shews that the audit of the sheriff's fees under the Juror's Act, Consol. Stat. U. C., ch. 31, is a judicial duty, and the Court cannot review their discretion when exercised. The audit is clearly conclusive, and cannot now be questioned.

Robinson, Q. C., and *H. J. Scott*, for the defendants. The

judgment of the learned Judge is not based on the 40 Vic. ch. 8, sec. 45. He merely refers to that Act incidentally, but decides the question apart altogether from that Act. The Act, however, does apply, as the audit took place after its passing. For the reasons already stated in the previous argument of the case, the audit was clearly not conclusive. They referred, in addition to the cases before referred to, to *Law Society of Upper Canada v. Corporation of Toronto*, 25 U. C. R. 199.

June 4, 1879. WILSON, C. J.—What is the meaning of this plea? 1. Is it that another action, or proceeding in the nature of an action, is pending between the parties and undetermined respecting the same matters? 2. Is it that by agreement of the parties the proceedings by and before the auditors were suspended until the judgment of the Court should be given upon the special case? 3. Is it that all parties acting in good faith proceeded with the audit after the delivery of the written opinion of the Court, believing the Court to have decided that the plaintiff was entitled to receive and recover from the defendants the said disputed items of claim, when in fact the Court had not decided that the plaintiff was entitled to receive and recover such items? or, 4. Is it that the items claimed by the plaintiff are not legally allowable, and are not legally payable to him, and are not recoverable by him under the circumstances set forth, although they may have been audited and allowed in his favour by the auditors?

If the plea be that of another action pending it is a good defence in bar of the present action.

If it is that by agreement of the parties all proceedings by and before the auditors were suspended until the judgment of the Court was given upon the special case, that I think may also be pleaded in bar of this action, although in legal effect it would be very much the same as the first question.

If it be that the claim was allowed by the auditors in the belief that the Court had decided the plaintiff was

entitled to receive and recover such items, when in fact the Court had not so decided, that matter may also, in my opinion, be pleaded as a bar to this action, because all parties believed they were giving effect to and were carrying out the judgment of the Court, and the auditors were not acting upon their own judgment, nor pretending or assuming to do so, and they were mistaken in doing what they did, thinking they were directed so to do by the order, decision, or judgment of the Court; and because the auditors, proceeding upon the mistaken belief that they were authorized to proceed, when in fact they were not, were exercising powers which they could not then exercise and were in effect acting without jurisdiction during the suspension of their authority.

If the meaning of the plea be that notwithstanding any audit of the items they are still disputable in an action brought by the person in whose favour the audit is made, I am of opinion such matter may be pleaded in bar.

The auditor is not for all purposes, although he may be as to some, in the position of an arbitrator whose judgment upon matters of fact and of law is final, unless in cases of fraud or misconduct. The auditor is bound to allow certain services and at certain rates upon due proof of the performance of such services, and if he refuse to allow the service or the rate, or allow a service or a rate contrary to the statute or tariff his audit may be impeached. In cases where he has a discretion as to the allowance of the service or the rate it is quite likely his discretion could not be questioned, unless on the ground of fraud or misconduct, as in the like case of an arbitrator.

The averment here is that the fees in question are not legally payable to the plaintiff, and, if not legally payable to him, no audit can make them a legal claim. The plea shews how and in what respect these items are said not to be legally allowable. Such an allegation must be a good defence, if true, and the truth of it the defendants' are willing to have tried, but the plaintiff, relying on the absolute and irresponsible power set up for the auditors,

declines all enquiry. The statute confers upon them no such powers, and how else they have acquired them is not stated.

The cases of *Bloxam v. Metropolitan R. W. Co.*, L. R. 3 Ch. 337, 344 note, 352; and *Regina v. Cumberlege*, L. R. 2 Q. B. D. 366, may be referred to.

In whichever of these ways the plea is read there is, in my opinion, a good defence.

The judgment of the learned Judge should therefore be affirmed.

The judgment will therefore be for the defendants on demurrer.

OSLER, J.—The facts stated in the fourth plea are properly the subject of a plea in bar. If they constitute a defence in law they go to the merits of the case and shew that the plaintiff has no cause of action.

I am of opinion that the plea sets up a good defence. Before the plaintiff can recover against the defendants for any of the demands in the declaration mentioned he must shew that his claim has been audited by the board of audit : R. S. O. ch. 85, sec. 7 ; and when the board of audit has duly allowed the fees the treasurer of the county shall, without further authority, pay the amount so allowed : sec. 12.

The question is, whether the fees have in fact been duly allowed by the board of audit. The plea shews that the board of audit refused to allow them, and, in substance, that on the plaintiff's application for a writ of mandamus it was agreed that they should be audited and allowed, or not, according to the judgment the Court of Queen's Bench might give on the special case set forth in the plea. That Court pronounced an opinion that the plaintiff was not entitled to the fees in question, but by a misapprehension and mistake of fact both parties supposed that the opinion of the Court was in the plaintiff's favour. Thereupon the board of audit, not exercising their own judgment or discretion in the matter, nor intending to do so, but on the

contrary, intending to adopt what they were informed was the opinion and judgment of the Court, allowed the fees in question.

The plaintiff contends that this was a judicial act on the part of the board, and that, in the absence of fraud or misconduct, the action of the board is final and irrevocable, and conclusively establishes his right to the fees and the liability of the defendants to pay them.

I am clearly of opinion that this contention is not well founded, and that the facts pleaded shew that the fees in question were not duly audited and allowed.

I think the plaintiff's claim stands on precisely the same footing on which it would have stood if it had been shewn that the board of audit having deliberately determined to disallow these fees had by mistake included them with fees which they had allowed.

GALT, J., concurred.

Judgment for defendants.

REGINA V. BONTER.

Evidence of prisoner in criminal cases—41 Vic. ch. 18, sec. 1, D.—Common assault.

Where a prisoner was indicted under 32 & 33 Vic. ch. 20, sec. 47, D., for an assault occasioning actual bodily harm: *Held*, that he could not be deemed to be on his trial on an indictment for a common assault, so as to entitle him to be admitted and give evidence as witness on his own behalf, under 41 Vic. ch. 18, sec. 1, D.

This was a case reserved by Cameron, J., at the last Spring Sittings of the Court of Oyer and Terminer, at Picton.

The prisoner was indicted, for that he did, on the 16th April, 1879, at the township of Ameliasburg, &c., in and upon one William Walter Kemp, make an assault, and him the said William Walter Kemp then did beat, wound,

and ill-treat with a club, in and about his head and other parts of his body, and thereby then occasioned unto the said William Walter Kemp great actual bodily harm, so that his life was greatly dispaired of.

At the close of the case for the Crown, the prisoner tendered himself as a witness on his own behalf, and required to be sworn to give evidence on his own behalf, on the ground that the indictment was in effect and in fact only an indictment for a common assault, and by the Act 41 Vic. ch. 18, D., he was a competent witness, and had a right to give evidence on his own behalf.

It was objected for the Crown that the prisoner was not a competent witness: that the indictment was framed under sec. 47 of 32 & 33 Vic. ch. 20, D.; and the indictment was not one for a common assault.

The learned Judge sustained the objection, and refused to allow the prisoner to be sworn or to give evidence on his own behalf.

The prisoner was convicted and sentenced to six months' imprisonment in the Central Prison for this Province, but the learned Judge, at the request of the counsel for the prisoner, stated a case for the opinion of this Court, and stayed execution of the judgment until the question submitted had been considered and decided by this Court.

The question for the opinion of the Court is: Was the said prisoner John Bonter a competent witness upon his trial upon the said indictment, and should he have been admitted to give evidence on his own behalf upon the said trial?

In this term, May 30, 1879, the case was argued.

Wallbridge, Q. C., for the prisoner. The question is, whether the prisoner was a competent witness on his own behalf under 41 Vic. ch. 18, D. Sec. 1 applies where the indictment is in itself for a common assault; while sec. 3 provides for the case of the Court being of opinion that upon the evidence only a common assault has been made.

out. The indictment is laid under sec. 47 of 32 & 33 Vic. ch. 20, D., and it is in fact and in effect only an indictment for a common assault. The section contains two parts. The first part refers to an assault occasioning bodily harm, and the latter refers in express terms to a common assault. On an indictment laid under the latter part of the section, he is clearly entitled to give evidence ; and he can equally do so under the former part. The case, however, comes within sec. 3 of 41 Vic. ch. 18, D., as the evidence establishes that the assault was nothing more than a common assault.

J. G. Scott, Q. C., for the Crown. The word "common" used in the latter part of sec. 47, was clearly used for some purpose, and that purpose was to distinguish it from the assault, referred to in the previous part, namely, an assault occasioning bodily harm, which is clearly not a common assault ; and the conviction is under the first part of the section, and therefore the evidence was properly rejected. The case of *Regina v. McDonald*, before the Court of the Queen's Bench in Michaelmas term last (a), is expressly in point, and shews that an indecent assault is not a common assault.

June 4, 1879. WILSON, C. J., delivered the judgment of the Court.

It is decided that a complaint before magistrates for an assault, or for a common assault, is under the statute a bar upon the magistrates' certificate of conviction being produced to any indictment or prosecution for any offence including an assault : *Re Thompson*, 6 H. & N. 193, because the magistrates are to determine in the matter before them, whether the assault was accompanied with any felonious

(a) The reporter of the Queen's Bench has furnished the following note of this case :

"This was a case reserved at the County Judge's Criminal Court of the County of Oxford. The prisoner was indicted for an indecent assault. At the close of the case for the Crown the prisoner tendered himself as a witness in his own behalf. The Judge at the trial ruled that as upon the evidence adduced an indecent assault had been proved the prisoner could not be a witness, but reserved the point for the opinion of the Court of Queen's Bench. The case was argued in Michaelmas term last, when the Court being of opinion that the ruling of the learned Judge at the trial was right, without reserving the case for further consideration, at the close of the argument, affirmed the conviction."

intention, and when they do so their determination is final : *Regina v. Walker*, 2 M. & Rob. 446 ; *Regina v. Stanton*, 5 Cox C. C. 324. See also *Regina v. Elrington*, 1 B. & S. 688.

These cases do most carefully distinguish between an assault merely, or a common assault, and an assault which is more than a mere assault or common assault, because accompanied, or charged to have been committed with a felonious intent, or to have been a felonious act.

Assaulting one is different from assaulting and wounding him with intent to murder, or assaulting and attempting to commit murder, and assaulting and committing grievous bodily harm with intent to maim, &c., or with intent to commit rape, or making an indecent assault. The character of the assault is different in all these cases from that of a mere assault. An indecent assault, for instance, is not the same as an aggravated assault, for that is only a worse or higher kind of a common assault. An indecent assault includes within the offence a special matter which is not a characteristic of a common assault. And it is manifest that an assault with intent to commit a felony, or to do or doing some special injury, is not a mere assault, simply because it is something more than a common assault.

A *common* assault is punishable by imprisonment for a term not exceeding one year with or without hard labour : Act of 1869, 32 & 33 Vic. ch. 20, sec. 47, D.

An assault *occasioning actual bodily harm*, which is here the case, is punishable by imprisonment in the penitentiary for three years as the maximum sentence. And an assault of which the party is convicted upon an indictment for a felony, which includes an assault, is punishable as the maximum punishment by imprisonment in the penitentiary for five years : Act of 1869, 32 & 33 Vic. ch. 29, sec. 51.

The case of *The Queen v. McDonald*, lately decided in the Queen's Bench, is express upon the point that an indecent assault is not a common assault, to entitle the defendant to give evidence in the cause.

These different assaults are plainly not of the same kind or degree.

Where, therefore, as in this case, the party was indicted for an assault " occasioning actual bodily harm," we are of opinion he cannot be said to have been upon his trial upon an indictment for only a *common assault*, and the defendant was not entitled to be admitted or received as witness on the trial under the Act 41 Vic., ch. 18, sec. 1, D., which applies in express terms only to prosecutions for a common assault, in which no other crime than a common assault is charged; and therefore, in this case, the crime charged of " occasioning actual bodily harm" by the assault, for which there is a higher and special punishment assigned than there is or can be imposed for a common assault, the defendant was not a competent witness upon the said trial; and we affirm the said judgment given on the said indictment.

Conviction affirmed.

TURCOTTE V. DAWSON.

*Foreign judgment—Appearance by attorney equivalent to personal service
—Recovery of judgment against natural justice—Appeal by co-defendant—Effect of.*

Held, in an action on a judgment recovered in the Province of Quebec, that an appearance entered by an attorney for defendant to the action in which the judgment was recovered, must be deemed either as an admission of or a dispensation with personal service, so as to preclude the merits of the original cause of action being entered into.

Where, after the entry of such appearance, the plaintiff accepts from defendant a mortgage in satisfaction and discharge of his claim, &c., and then without any notice to or knowledge by defendant proceeds with the action and recovers judgment.

Quære, whether, although precluded from entering into the merits, evidence of such circumstances may not be given, as shewing that the judgment so recovered is contrary to natural justice and a fraud on defendant; and a new trial was granted to afford the defendant the opportunity of thus questioning the recovery.

Where, also, a co-defendant in the original action in said Province had appealed therein from said judgment, which appeal was still pending.

Quære, whether, during the pendency of such appeal, an action can be maintained on said judgment against a defendant who has not appealed. The evidence on this point being conflicting, the new trial was also granted thereon, to enable further evidence to be adduced.

THIS was an action on a judgment obtained in the Province of Quebec.

The first count of the declaration was on a judgment obtained at Three Rivers, Quebec, on 2nd March, 1874, against the defendant and one W. McD. Dawson.

The second count was for the costs of an appeal from said judgment to the Court of Appeal of said Province, (on the ground of irregularity), and which appeal was dismissed with costs.

Pleas. 1. To whole declaration : Never indebted.

To first count. 2. That the judgment was obtained in a suit in which personal service was not obtained, and in which no defence was made ; and that after the commencement of the action, and before judgment, the defendant satisfied and discharged the plaintiff's claim by payment.

3. A similar plea, but alleging that the defendant gave the plaintiff a mortgage on certain lands in Quebec, which the plaintiff accepted in satisfaction and discharge of his claim, and damages and costs.

4. That before the commencement of this suit, and after the recovery of the judgment now sued upon, an opposition to and appeal against said judgment was duly made and entered by W. McD. Dawson, and was duly entertained by the Court of Queen's Bench in Quebec, being the proper Court in that behalf, which opposition and appeal at the time of the commencement of this suit was since, hitherto hath been, and now is pending and undetermined, and by which it is prayed that the said judgment may be declared null and void. And the defendant further says that according to the law of Quebec the said judgment and the defendant's liability to pay the sum of money in said count mentioned, before and at the commencement of this suit, were, and now are, during, and by reason of the pendency of said opposition and appeal suspended, and the said judgment became and was and is of no force or effect, until the same shall have been affirmed by the said Court of Queen's Bench, which has not yet been done.

5. That the judgment was obtained by fraud.

6. After repeating the recovery of judgment, &c., as in the second plea, alleged that said judgment was for the amount

of a promissory note, and was recovered for said note and no other moneys; and also that after said note was made, and after it was issued, it was made void by being materially altered without the consent of the now defendant, that is to say, by inserting in the said note in writing the words, "with interest at the rate of 12½ per annum.

7. After repeating the recovery of judgment, &c., as in the second plea, alleged that said judgment was for the amount of a promissory note, and was recovered for said note and no other moneys, and concluded that defendant did not make the said promissory note, as was alleged in the said suit. Issue.

The cause was tried before Hagarty, C. J., without a jury, at Toronto, at the Winter Assizes of 1879.

At the trial the plaintiff put in an exemplification of the judgment.

For the defence the evidence of the defendant taken under a commission was put in. He stated that he had not been personally served with the summons in the original action: that he had given no instructions to defend: that he heard that an appearance had been entered for him, after it had been entered, and he at once went to settle the matter by giving a mortgage on some lands in Quebec, and the suit was dropped. This was in 1866. He next heard of the matter in 1874, when he heard that judgment had been signed against him in the suit he thought settled; but he had no notice until after the same was signed, and the only proceedings against him since was the present action: that he gave no instructions for appeal, and was not aware of the appeal at the time it was taken.

Evidence of professional gentlemen in the Province of Quebec, also taken under commission, was put in, upon the issue raised by the fourth plea, namely, as to the right of the plaintiff to proceed upon the judgment during the pendency of the appeal by the co-defendant in the original action, but the evidence was very conflicting as to the right of the plaintiff to proceed in such case.

The learned Chief Justice was of opinion, on the authority of *Tilton v. McKay*, 24 C. P. 94, that the appearance put in by the attorney to the action on which the judgment sued upon was recovered, was evidence of personal service, or was a sufficient substitute for it, or a dispensation with it, so as to preclude the defendant from entering into the merits of the original action ; and he entered a verdict for the plaintiff, and assessed the damages, but referred the questions of law to the Court.

In this term, February 6, 1879, *J. R. Roaf* obtained a rule calling upon the plaintiff to shew cause why the verdict should not be set aside and a new trial had or a nonsuit, on the ground that this is a case in which the defendant can plead and give in evidence any matters he might have set up to the original action, the original process or writ not having been personally served, and no defence having been made to the action ; and also, that the plaintiff is not entitled to proceed upon said judgment, all proceedings therein being stayed by the subsequent proceedings upon said judgment ; and also, that the verdict is against law and evidence.

During the same term, May 2, 1879, *McMichael*, Q. C., and *S. G. Wood*, shewed cause. The appearance entered for the defendant to the action on which the judgment now sued upon was recovered, must clearly be deemed to be equivalent to personal service. Moreover the proceedings in appeal in which defendant's name was used were equivalent to a defence. The defendant cannot now enter into the merits of the original action : *Tilton v. McKay* 24 C. P. 94; *Montreal Mining Co. v. Cuthbertson*, 9 U. C. R. 78.

Ferguson, Q. C., and *J. R. Roaf*, contra. As a matter of fact the defendant did not instruct the appearance to be entered or the appeal to be taken, and was not aware of either till after it had been done. There was no personal service, and no defence. In *Tilton v. McKay*, 24 C. P. 94, the defendant took a benefit from the action

taken. Here the defendant derived no benefit from the appearance. That case was also decided upon the authority of *Montreal Mining Co. v. Cuthbertson*, 9 U. C. R. 78, which was before 23 Vic. ch. 24, secs. 2, 4; and the statute seems to have been overlooked in *Tilton v. McKay*. By the appeal of the co-defendant in the original suit all the proceedings were stayed on the original judgment, and no action could be taken against the defendant: *Brush v. Wilson*, 6 L. C. Rep. 39.

June 4, 1879. WILSON, C. J.—This is an action upon a judgment recovered in the Province of Quebec against the defendant and another, to which the defendant has pleaded several pleas to the merits of the original cause of action. The learned Chief Justice of the Queen's Bench was of opinion at the trial before him, that the case of *Tilton v. McKay*, 24 C. P. 94, having decided that the putting in of bail to an action in Quebec, which was an appearance in and to the action, admitted or answered the purpose of a personal service of process in that action, he should hold that the appearance put in for the defendant by an attorney to the action in which this judgment was obtained was evidence of a personal service, or was a sufficient substitute for it or a dispensation with it, and the damages were thereupon assessed, and the matters of law were referred to the Court.

I have heard the case argued, and I may say that, in my opinion, an appearance entered by the party or by his attorney in or to the process or action is equivalent to personal service of the process. The whole object and purpose of such process is to procure and compel an appearance to it, and when the appearance is entered the purpose of the process is answered and determined. A defendant who has appeared, although he has not been personally served, has taken more effectual means to defend the action than the defendant who has been personally served but does not appear. The appearance should either be taken as an admission of personal service or as a

dispensation with it. In the former case a mere traverse, as in this case, of the personal service of the process will be sufficient. In the latter case the plaintiff should consider whether he should not specially reply the fact of dispensation.

If the case rested there I should probably have to discharge the rule. But there is a state of facts which I think has not been considered yet.

The defendant is, as I have stated, precluded from going into the merits of the original action by reason of the appearance which he made in that action; but, if after that appearance, he gave the mortgage he has pleaded in satisfaction and discharge of that action and of all damages and costs in respect thereof, either in payment or in satisfaction and discharge, which the plaintiff accepted, and the plaintiff after that payment or satisfaction *proceeded with the action* without notice to the defendant or knowledge by him, and contrary to good faith, and in fraud of the defendant, it may be that the judgment so recovered would be contrary to natural justice, or a fraud, and the defendant should be allowed to plead such fact.

There is a plea of fraud already upon the record which may raise the supposed fraud just alluded to, that is *proceeding with the action* after payment or satisfaction of the original claim without notice to the defendant; but there is no plea of the recovery without notice, &c., after such payment or satisfaction being contrary to natural justice.

I do not say how far either line of defence can be available to the defendant upon the facts of this case. I only say the case has not been considered in that light, and the defendant should, from the circumstances of the case, be allowed to question the recovery on these grounds, if he thinks he can successfully do so.

There is also the appeal of the co-defendant in the original action brought upon the judgment now sued upon, and which is still pending, as pleaded in the fourth plea.

The evidence as to the effect of an appeal by one of several defendants upon the rights of the plaintiff to pro-

secute his rights upon the judgment pending that appeal against the other defendants who have not appealed, has not been sufficiently considered either.

The evidence is conflicting upon the right of the plaintiff to proceed upon the judgment in such a case.

Brush v. Wilson, 6 L. C. Rep. 39, decides that upon an appeal which removes the judgment and all the proceedings of the Court, the plaintiff cannot, when one of several defendants appeals, proceed upon the judgment in the Court appealed from against the non-appellant defendants, because the judgment and papers are no longer in that Court, and there is nothing upon which execution can be issued, while a professional gentleman who was examined under commission gives evidence of a contrary nature.

I think there should be further and better evidence in such a case, because we cannot decide the foreign law satisfactorily upon so direct a disagreement of opinion, and when more convincing testimony in favour of one view or the other can, no doubt, be procured.

As that issue has really not been tried, I think there should be a new trial without costs.

GALT, J., concurred.

OSLER, J., took no part in the judgment, having been concerned in the case while at the bar.

Rule absolute.

REGINA V. STITT.

Criminal law—Supplying noxious thing with intent to procure abortion—33 & 34 Vic. ch. 20, sec. 60, D.

The prisoner, with intent to procure abortion, supplied a pregnant woman with two bottlesful of Sir James Clarke's Female Pills, with directions to take twenty-five at a dose, and that it would have that effect. The pills contained oil of savin, an article used to procure abortion, and it was said that a bottleful would contain about four grains, but the evidence was not very clear as to this. It was in evidence that such a quantity would be greatly irritating to a pregnant woman, and might possibly procure an abortion, and that oil of savin in any dose would be most dangerous to give to a woman in that condition.

Held, under the circumstances, there was a supplying of a noxious thing within the meaning of the Act 33 & 34 Vic. ch. 20, sec. 60, D., with the intent to procure an abortion.

This was a case reserved by Osler, J., at the last Spring Sittings of the Court of Oyer and Terminer at Toronto.

The prisoner was tried upon an indictment framed under the Act 32 & 33 Vic. ch. 20, sec. 60, D, for unlawfully supplying or procuring a certain noxious thing called savin, knowing that the same was intended to be unlawfully used or employed by one Mary Collins to procure the miscarriage of her the said Mary Collins.

The defendant appeared and pleaded not guilty.

Upon the trial it was proved that the defendant had procured for the prosecutrix or supplied her with two bottles of a certain pill, called Sir James Clarke's Female Pills, and had given her directions to take twenty-five of these pills at a dose. There were printed directions or instructions on the wrappers which accompanied the bottles to take one pill night and morning, increasing to four pills a day, if necessary. They were declared on the wrappers to be perfectly harmless, and to be peculiarly suited to married women, and that they were unfailing in the cure of all the painful and dangerous disorders to which the female constitution was subject. There were directions also for using them on the approach of childbirth.

Each bottle contained from three to four dozens of the pills. The defendant told the prosecutrix that there was no use going by the directions on the wrappers: that it would

only help it along instead of getting rid of it : that if she took the number he said it would produce a miscarriage.

Professor Croft, analytical chemist, said that he had analysed two or three of the pills taken from one of the bottles, and found that they contained oil of savin : that he had not pills enough to enable him to determine any particular quantity of oil of savin, but he found oil of savin there : that the pills he had were so few that he could not determine the quantity. And in answer to a question by the learned Judge whether within limits he could say, from the quite appreciable but not measurable quantity of oil of savin contained in the two or three pills he had analysed, what quantity would have been in the bottle, assuming it to be full, he said it would be about four grains ; but that was only an estimate—it was the best estimate he could make.

It was further proved by a medical witness that oil of savin was well known as a popular abortive, and that it had been used for that purpose frequently : that it would be a dangerous thing to give in almost any dose to a pregnant woman : that the dose mentioned in the British Pharmacopeia is from one to five minims, that is as a remedy to bring on menstruation (a minim is 9-10ths of a grain) : that a medical man, if satisfied that a woman was not pregnant, would not be doing wrong in administering such a dose ; but that any administration of oil of savin to a pregnant woman was a most improper thing : that if a large dose of oil of savin was given miscarriage might ensue, but with some women it would be almost impossible to bring about such a result : that if four grains of it were contained in one of these bottles a bottleful might prove greatly irritating to a pregnant woman : that it might possibly procure abortion. He said that he had no experience of the pills in question, and did not know that they contained savin : that one, two, or three pills were not in themselves noxious things.

For the defence it was proved that the article known as “Sir James Clarke’s Female Pills” was commonly sold in

the drug stores as a medicine : that it did not come under the class of poisons ; and that it was not an article prohibited by statute, and was sold to every one who asked for it.

The defendant contended that there was no evidence that the thing procured or supplied was noxious : that oil of savin itself, as such, was not a noxious thing : that the word "noxious" must apply to the thing itself : that neither "Sir James Clarke's Female Pills," nor oil of savin, came within the description of a noxious thing ; and that the mere fact that a large quantity might possibly have a deleterious effect, would not render it a noxious thing within the statute.

The defendant was found guilty ; but at the request of the defendant's counsel the learned Judge postponed sentencing the prisoner, and reserved a case for the opinion of this Court.

The questions for the opinion of this Court were :—

1. Whether there was any evidence that the thing supplied or procured by the defendant was a noxious thing within the meaning of the Act ?

2. Assuming that oil of savin was not in itself a noxious thing, but only became so when used in large quantities, whether there was any evidence that the defendant had supplied it in sufficiently large quantities to constitute it a noxious thing within the Act ?

During this term, May 31, 1879, the case was argued.

McMichael, Q. C., for the prisoner. The case turns on the construction to be placed on the words used in sec. 60 of 32 & 33 Vic. ch. 20, D., namely, supplying or procuring any poison "or other noxious thing" &c., "knowing the same is intended to be unlawfully used or employed with the intent to procure the miscarriage of any woman," &c. The indictment is based on the supplying a noxious thing within the meaning of the statute. There is no evidence of the thing supplied being noxious. Sir James Clarke's Female Pills are not included amongst poisons, but are

publicly sold as a medicine. The thing must be noxious itself, and not merely when taken in excess, even although it may have been administered with intent; and although the pills were proved to contain oil of savin, which is used to procure abortion, it was not in sufficient quantity to do so: *Regina v. Perry*, 2 Cox C. C. 223; *Regina v. Hennah* 13 Cox C. C. 547; *Regina v. Isaacs*, 1 L. & C. C. C. 220, 9 Cox C. C. 228, 9 Jur. N. S. 212.

J. G. Scott, Q. C., for the Crown. The words, "other noxious thing," in the statute include not only something which is noxious in itself, but that which may become so from the quantity used or the conditions under which it is given. The evidence shews that oil of savin in any quantity given to a pregnant woman is most dangerous, and that the quantity here used was clearly sufficient to procure a miscarriage. The intent also is material, even though it be proved that abortion would not have been caused: *Regina v. Hillman*, 1 L. & C. C. C. 343; *Regina v. Hollis*, 12 Cox C. C. 463; *Regina v. Cluderay*, 1 Den. C. C. 524; *Regina v. Dale*, 6 Cox C. C. 14; *Russell on Crimes*, 5th ed., vol. i. 853.

June 4, 1879. WILSON, C. J.—It seems to me that a thing may be or become noxious by the quantity of it taken or administered, as well as by the quality of the article itself.

Poisons are not noxious things taken as medicine in ordinary medical doses and treatment; but on the contrary are valuable and beneficial remedies in the prevention and cure of ailments, and in the restoration of health.

But if taken or administered in undue and immoderate quantities the excess of the article becomes noxious.

It is said "intoxicating drinks are noxious; the more concentrated, pernicious": *Worcester's Dictionary*, title, *noxious*.

If *intoxicating drinks* are noxious, it can only be by their excessive use, or by using them when they should not be taken, because in general intoxicating drinks are

not noxious, although they may be in no way beneficial or necessary.

Giving a teaspoonful of brandy to a person may not be giving him a noxious thing, but giving him a pint of it may be so, becoming noxious only by reason of the very large quantity of it given. So, too, the giving of alcohol in a small quantity to one in health may not be noxious ; the giving of the like quantity to another who is in a condition which makes it dangerous to take it, may make it noxious to such person. That article which would be innoxious to a strong or healthy person, may be a noxious article to a weakly or unhealthy person.

And in like manner that article which may not be noxious to a woman not pregnant, may be noxious to a woman who is pregnant.

If it were not for the doubtful language attributed to the Lord Chief Justice of England, in the case of *Regina Hennah*, reported in 13 Cox C. C. 547, I should not have doubted of the matter at all. For it appears to me that administering a thing in a concentrated form so as to be plainly noxious in that form, is just the same as administering an excessive quantity of the article in its primitive form.

And so it is the same offence to administer an article in its concentrated noxious form, as to administer the concentration not sufficiently reduced or diluted to make it innoxious.

The only question then which we have to determine is, whether it appears by the evidence that the defendant supplied a noxious thing with the intent to procure abortion.

The pills supplied contained savin, which is an article used to procure abortion. It was given to a pregnant woman with the intent she should take it to produce abortion. She was given by the defendant two bottles of these pills, and it is said that each bottle containing from three to four dozen pills would probably contain four grains of oil of savin. It is said that from one to five

minims—the latter quantity being four and a half grains—is the quantity which may be given to a woman not pregnant in order to bring on menstruation; and from that it was contended for the prisoner that it did not necessarily follow that the whole of the contents of one bottle, or even of the two bottles, would certainly, if quantity is to be considered, be a noxious thing. But there was evidence that it was dangerous to give oil of sabin in almost any quantity to a pregnant woman, and that it was a most improper thing to give to a pregnant woman such a dose as may be given to a woman not pregnant, or to bring on menstruation. It was also said that *a large dose* of oil of sabin might produce miscarriage with some women, but with some women it might not. What that large dose was was not further explained than in this way: "that if four grains of oil of sabin were contained in one of these bottles, a bottleful might prove greatly irritating to a pregnant woman: that it might possibly procure abortion;" and the woman was supplied by the defendant with two of such bottles, with directions to take twenty-five of the pills at a dose, and if she did it would produce a miscarriage.

I do not think the evidence is quite as plain and direct as it might have been that the twenty-five pills the woman was directed to take as a dose, or one bottle of pills, containing from three to four dozen pills, or the two bottles, which would be from six to eight dozen of pills, would be likely, or would be sufficient to produce miscarriage, or would from the quantity to be taken be a noxious thing to any woman, or would from the condition of this woman be a noxious thing to her; but I think there is sufficient evidence to shew that the number of this particular kind of pill supplied by the defendant to be taken by this pregnant woman, was a supplying of a noxious thing within the meaning and contrary to the provisions of the statute, and, although the two bottles of pills were not supplied at the one time, but one bottle about two days after the other, it will make no difference in

the case, which I am now informed was the fact, although I was reading the case as if the two bottles had been supplied at the one time.

I am of opinion the judgment given by the learned Judge should be affirmed.

GALT and OSLER, JJ., concurred.

Conviction affirmed.

GIBBS ET AL. v. THE DOMINION BANK.

Warehouse receipt—Continuing guarantee—Trover—Wharfage—Money had and received.

The defendants, a bank, advanced to F. & McL. \$2,250, on a warehouse receipt for 3,000 bushels of wheat, valued at 75c. per bushel. F. & McL. subsequently paid in \$1,920, which they had obtained from the plaintiffs, who were in reality the owners of the wheat, for whom F. & McL. were acting, leaving a balance due of \$330. The plaintiffs notified the bank of their claim, but the bank in disregard thereof, contending that the warehouse receipt was a continuing security for F. & McL.'s general balance, which at that time exceeded \$2,250, shipped it off for sale, incurring wharfage fees thereby, and the whole of the wheat was sold.

Held, that the evidence, set out below, shewed that the warehouse receipt was not a continuing security to \$2,250, but only for the repayment of that specific sum.

Held, also, that under the circumstances the claim for wharfage could not be entertained.

Held, also, that plaintiffs might maintain trover against defendants; for that the fact of there being some part of the \$2,250 due at the time of the sale, did not justify the sale of the whole of the wheat, it being capable of division, so that enough to satisfy the amount due need only have been sold.

Held, also, that even if trover was not maintainable, leave would now be granted to add a count for money had and received, the contest at the trial being as to whether there was a continuing security, and not as to the form of the action.

ACTION of trover for conversion of wheat.

Pleas: not guilty ; and not possessed.

Issue.

The cause was tried before Gwynne, J., without a jury, at Whitby, at the Fall Assizes of 1878.

The evidence shewed that Fleming & McLeod were purchasers of grain at Bowmanville, which they stored in the warehouse of the Port Darlington Harbour Company. They bought largely for the plaintiffs with moneys furnished by the plaintiffs. The grain was stored in the name of Fleming & McLeod.

They made an arrangement with the defendants by which the defendants were to advance to them \$2,250 on the security of a warehouse receipt for 3,000 bushels of spring wheat, valued at 75c. per bushel. The warehouse receipt was given on the 17th May, 1878. The \$2,250 was not carried to the credit of Fleming & McLeod with the bank ; but the first money the bank paid upon that agreement was on the 18th of May, 1878.

The account of Fleming & McLeod, with the bank stood to the debit of Fleming & McLeod at the close of
 that day with..... \$30 24
 That account went until the close of the 25th of
 the month when..... 2850 64
 additional had been drawn out by Fleming &
 McLeod.
 Making in all.....\$2880 88

During that time they paid into the bank

On 21st May	\$1200
25th "	600
27th "	120

Being..... \$1920

These payments were made by the plaintiffs to Fleming & McLeod, which the latter deposited in the bank to their own credit.

At the beginning of the business at the bank on the 27th May, 1878, the bank had advanced, as before stated, \$2880 88, being \$630.88 in excess of the \$2250 promised to be advanced. And Fleming & McLeod with the plaintiffs' moneys paid in upon that account to its credit \$1920, leaving of the promised advance \$330 still unpaid, and the only sum, as the plaintiffs contended, which was secured by the warehouse receipt.

The plaintiffs contended that after payment of the \$2250 they were entitled to the wheat, as the bank had not a continuing security upon the grain for a general balance of \$2250, but a claim only for the repayment of that specific sum; and that as that sum was reduced by the payments made on account, of \$1920, as before stated, they were entitled to recover in this action for the value of the grain which the defendants had sold, less the balance due to the bank on the \$2250 of \$330; and the learned Judge so decided at the trial.

The defendants insisted that the warehouse receipt was a continuing security for any balance owing to them, and as more than the \$2250 remained due to them when they sold the wheat they were entitled to have that amount at any rate applied to their general balance which exceeded the \$2250.

The learned Judge found a verdict for the plaintiffs, with damages \$2,700, the value of the proceeds of the grain sold.

In Hilary term, February 15, 1879, the verdict having been rendered after Michaelmas term by adjournment *Osler* obtained a rule calling on the plaintiffs to shew cause why the verdict should not be set aside, and a verdict or nonsuit entered for the defendants, on the ground that the verdict was contrary to law and evidence; and that upon the evidence the defendants had a right to sell the wheat the conversion of which is complained of; and they were not liable in trover, there being, in any view, something due to them on account of moneys advanced on the warehouse receipt.

In this term, June 6, 1879, *McMichael* shewed cause. If the defendants acquired a title to the wheat from *Fleming & McLeod*, and as to which he referred to R. S. O. ch. 121, Consol. Stat. C. ch. 54, sec. 85, 24 Vic. ch. 23, 34 Vic. ch. 5, sec. 46, D., they had no right, when their claim was reduced to only \$330, to sell wheat to the amount of \$2700. The sale beyond the \$330 was a conversion for

which trover will lie. It is said such an action of trover will not lie if any sum however small be due to the defendants. That may be so when there is a single chattel or some particular property which cannot be sold in part, but that cannot apply to wheat which is sold and is divisible by the bushel, and in this case the defendants could have sold as much of the wheat as would have produced exactly the sum which was due to them : *Heffernan v. Berry*, 32 U. C. R. 518; *Lord v. Price*, L. R. 9 Ex. 54.

Robinson, Q. C., and *W. Mulock* contra. Fleming & McLeod had the right and power to give the warehouse receipt for the wheat and to confer a title to it as against the plaintiffs upon the bank. The statutes shew plainly that Fleming & McLeod could do so. The defendants having the lawful possession of the wheat and the right of sale of it upon default of repayment of the advance made, had the right to sell the whole quantity of wheat mentioned in the receipt upon any part of the money being over due. It was only a single article. It was a particular body or quantity of grain. If, however, there is a different rule when the goods consist of different articles part of which is sufficient upon the sale to pay the claim, and if this wheat is within such a rule, still it does not follow that trover will lie for selling beyond what may be necessary. The plaintiffs should not be allowed to add the money counts at this stage of the case, as an amendment of that kind was not asked for at the trial. The defendants should be allowed to amend their accounts and to make them according to the actual agreement which was made with Fleming & McLeod, that is, by crediting the payments or deposits made by Fleming & McLeod specifically to that part of the bank account which was not protected by the warehouse receipt. The following cases were referred to : *Donald v. Suckling*, L. R. 1 Q. B. 585; *Halliday v. Holgate*, L. R. 3 Ex. 299; *Aldred v. Constable*, 6 Q. B. 370; *Heffernan v. Berry*, 32 U. C. R. 518; *Milgate v. Kebble*, 3 M. & G. 100.

June 27, 1879. WILSON, C. J.—The grain was in reality the property of the plaintiffs, but Fleming & McLeod conferred a good title to it on the bank by reason of their being agents entrusted with the possession of it, and entrusted with such possession, or of the documents of title, under Consol. Stat. C. ch. 59, R. S. O. ch. 121, the defendants dealing *bona fide* with Fleming & McLeod as owners of the grain and without notice that they had no authority so to deal with it. See also 34 Vic. ch. 5, sec. 46, D. The bank's title was not much disputed.

So far as the merits are concerned the plaintiffs are, in my opinion, entitled to retain their verdict. The advance which the defendants made to Fleming & McLeod was to be repaid as an ordinary loan. The advance was secured by a warehouse receipt given to the defendants. The agreement was not that the receipt was to be a continuing guarantee to the extent of \$2,250.

The evidence of Mr. Codd, the bank manager, shews what the bargain was.

The learned Judge said to Mr. Codd, "If there was no agreement for repayment, no specified time for repayment, I would like to know what the agreement was?"

Answer: "They," (Fleming & McLeod) "represented to me, when they first applied, that the reason they required the advance was that they had no money to use on account of their having bought an amount of wheat for Messrs. Gibbs, for which they had not been paid. The understanding was, that the advance being wanted for them it was supposed it would be repaid as soon as Messrs. Gibbs repaid them, or when they had sufficient money to repay it."

The advance to the extent of \$2,250, made in separate sums, was the first and earliest part of the debit side of the bank's account against Fleming & McLeod. The payments which they made after these advances began was therefore in the ordinary course between debtor and creditor, when no special direction has been given by the debtor, and no special appropriation has been made by the creditor, placed against the earliest items of the account. But here

Mr. Codd said that it was the special bargain between him and the debtors that such a course should be pursued. And it was right it should have been so pursued, because it was the plaintiffs' money as well as their wheat, and it was only just that their money should have been applied in freeing their property from the warehouse receipt which Fleming & McLeod had wrongfully, as respects the plaintiffs, given upon it to the defendants.

The learned Judge adopted that view of the case, and I quite approve of his decision and finding.

I also agree in the correctness of the sum he found in favour of the plaintiffs.

I am not disposed to allow the charge of \$90, which the defendants paid for wharfage, because they had no right in law to sell the whole of the grain when only \$330 was due to them upon the warehouse receipt, and the defendants, after being notified by the plaintiffs of their claim to the grain, proceeded in disregard of that notice and shipped it off for sale, and the wharfage was incurred in that way.

It was contended for the defendants that trover would not lie if there was any part of the \$2,250 unpaid at the time of the sale of the grain. But we think that is not the law.

Aldred v. Constable, 6 Q. B. 370, was a case in which trover was sustained against the sheriff for selling goods under an invalid execution, after having sold enough under a prior valid execution to pay it off. *Stead v. Gascoigne*, 8 Taunt. 527, was very similar to it.

In *Batchelor v. Vyse*, 4 M. & Sc. 552, the sheriff was held liable in trover for selling more goods under an execution after he had made sale of sufficient goods to pay the debt and costs, and all charges.

I have no doubt the like remedy could be maintained against a landlord for selling goods of the tenant in excess of the sum requisite to pay the arrears of rent and charges.

If there had been any doubt upon this point we should give leave to the plaintiffs to add a count for money had

and received by the defendants to the plaintiffs' use, because it was not the form of the action which the defendants went down to trial to contest, but whether they had not the right to retain the whole of the wheat covered by the warehouse receipt in security for their general balance, that is, to treat it as a continuing guarantee, and to apply the proceeds of the sale of the wheat to the account generally, and not only in repayment or reduction of the special advance of \$2250, and that question was decided against them; and therefore any form of statement or amendment which would allow of that question upon the facts of the case being formally determined, it would be proper and, in my opinion, our duty to make.

If there is any doubt whether trover will lie in such a case or not it arises upon the statute 34 Vic. ch. 5, sec. 46, D., where at the end of the section it is said, "And in the event of the non-payment of such bill or note or debt, when due, such bank may sell the said cereal grains," &c., "and retain the net proceeds, or so much thereof as will be equal to the amount due to the bank," &c., "with interest and costs, returning the surplus, if any, to the person from whom such instrument was acquired by the bank."

It is the duty of the sheriff to sell the goods seized, and if there is a surplus to return it to the owner; but he is nevertheless a wrongdoer for selling more than he is authorized by law to sell to satisfy the writs he has. So a landlord who sells for a larger claim than he justly has so that he is a wrongdoer, may be sued for the excess, or for money had and received: *Graham v. Tate*, 1 M. & S. 609, although, if the landlord has a surplus rightfully in his hands, he is not liable to such an action. The remedy must be in another form: *Yates v. Eastwood*, 6 Ex. 895; and, as before mentioned, the landlord would be liable in trover for selling beyond what was sufficient to satisfy his claim, that is, if he committed a manifest wrong, the excess being inexcusable.

I do not think, therefore, that the power of the bank to sell, which they would have, in my opinion, at the common

law as of right, can be held to justify them in selling the whole of the property covered by the warehouse receipt, amounting in value, it may be, to thousands of dollars, merely because there may be only hundreds due, or less even than a hundred, when the property is of such a nature that it is capable of division, as grain and lumber and bales and boxes of goods are.

The rule should be discharged.

GALT, J., concurred.

OSLER, J., took no part in the judgment, having been concerned in the case while at the bar.

Rule discharged.

McCOLL ET UX. V. HIGGINS ET AL.

Highways—Contract with Dominion Government—Necessity for cutting away highway—Specifications—Requirements of—Temporary bridge—Sufficiency of—Jurisdiction.

Under a contract made between defendants and the Government for the performance of certain work on the Welland Canal, a Government work, it being necessary to cut away the public highway, the specifications, in accordance with the Act 31 Vic. ch. 12, sec. 29, D., provided that before such highway was cut away or disturbed the defendants should provide another and satisfactory means for the public travel, and were to be held legally liable for keeping the crossing so that it could be safely used. The defendants under these powers erected a temporary bridge, being allowed by the Government \$800 therefor, of which they did not expend more than half, although they paid something besides for the approach to the bridge. In an action by the plaintiffs for the alleged insufficiency of the bridge for its intended purpose in consequence of which the plaintiffs were injured, the jury were directed that the defendants were only required to erect a temporary bridge of the like nature which a municipality would need to make while a permanent bridge was being repaired or rebuilt.

Held, that the direction was insufficient: that the jury should have been told that although a temporary bridge need not be constructed in the same manner, and with the same care and finish or materials as a permanent bridge, yet equally therewith it must be constructed and maintained so as to be a safe and strong roadway for the public travel; and they should be asked whether the bridge in question was of this character.

ACTION for injuries to the wife, and for damages sustained by the husband for injury done to his horses, waggon,

and harness, and for the loss of his wife's services, and for medical charges, by reason of his team and waggon, in which the plaintiffs were, falling from a bridge.

The declaration contained six counts. The first three counts placed the liability of the defendants to put up and maintain a sufficient bridge by reason of their contract to that effect which they entered into with Her Majesty, for the performance of certain work upon the Welland Canal.

The next three counts placed the liability of the defendants with respect to such bridge upon their common law liability, because they cut a way a portion of the highway so as to render it otherwise impassable.

The defendants pleaded :

To the whole declaration—1. Not guilty.

To the first count—2. That the defendants did provide, erect, build, and maintain a suitable bridge across the Welland Canal, and put up and maintain such fences as were required for the public safety, in accordance with the terms of their contract with the Department of Public Works.

3. That by the terms and conditions of their contract with the Department of Public Works they were to erect such a bridge across the Welland Canal as might be accepted by the engineer in charge of the said works, and that they did in accordance with said contract erect and build a bridge across the said Welland Canal, which was approved of by the engineer in charge of the said works.

To each of the other five counts, the like special pleas were pleaded.

Issue :

The cause was tried before Patterson, J., with a jury, at St. Catharines, at the Spring Assizes of 1879.

The defendants were contractors under a contract with the Dominion Government for the performance of certain work at the Welland Canal.

The provisions of the specifications relating to this matter were as follows:

"Before the present public road is cut away, or in any

way disturbed, the contractor must provide, at his own cost and expense, another and satisfactory means for the public travel to pass, either by the formation of another road or the construction of a temporary bridge, or both, as may be found necessary; and he must put up and maintain all such fences as may be required for public safety. It being clearly and distinctly understood that he (the contractor) shall be held legally liable and responsible for keeping everything connected with the crossing in such a condition that it can be safely used during the whole time that the bridge is in progress of construction."

There was evidence on both sides as to the safety and sufficiency of the bridge for general public use and travel.

The learned Judge directed the jury that the erection, being a temporary one in substitution of the former highway while the public work at the canal was in progress, the contractors for that work, and who had erected the bridge under the provisions of their agreement with the Crown, were bound only to have such a bridge which a municipality, whose bridge had been carried away, could be required to construct as a temporary erection while they were putting up their permanent bridge.

The plaintiffs' counsel contended that the jury should be told that it was the defendants' duty to provide a road or crossing such as was set out in the specifications, and to have asked the jury to say whether the defendants had provided such a road or crossing.

The jury found a verdict for the defendants.

In this term, May 21, 1879, *J. A. Miller*, obtained a rule calling on the defendants to shew cause why the verdict for the defendants should not be set aside, and a new trial had, for the alleged misdirection of the learned Judge.

During the same term, May 31, 1879, *Bethune*, Q. C., shewed cause. There was no misdirection in telling the jury that the defendants were only required to provide a temporary structure of the like nature which a municipality

would be warranted in putting up while the permanent bridge was being repaired or rebuilt. The public roads and bridges of the Province are within the sole control of the local Legislature, and of the different municipalities and bodies in which they have been vested by the Legislature; and if the local Legislature by special Act or by general law declare what shall be a sufficient bridge or highway, it will be sufficient for the purpose of this action if the bridge or highway which may be in question is made in accordance with such local enactment, although it may not be constructed in such a manner as to be a compliance with the agreement between the contractor of a public work and the Dominion authorities. But if the learned Judge should have directed the jury in the words of the contract to say, whether the defendants had provided "another and satisfactory means for the public travel to pass," &c., "by the construction of the temporary bridge," and whether he had put up and maintained "all such fences as were required for public safety," the contractor being for the purposes of the argument assumed to be liable "for keeping everything connected with the crossing in such a condition that it can be safely used during the whole time that the" (permanent) "bridge is in progress of construction," all that is just the kind of obligation which would rest upon a municipality under our local Acts, and there was no misdirection in putting the case in the manner in which it was submitted to the jury.

J. A. Miller, contra. The defendants' liability was by reason of their contract, as well as by the general law, and the case should have been left to the jury as it was affected by the contract, even if it were left in the other form as well. The defendants were paid far more for putting up a proper bridge than they expended upon it, and they said that with an outlay of \$200 more than they had expended they could have put up a railing which could not have been forced off. There was clearly misdirection, and a new trial should be granted.

June 27, 1879. WILSON, C. J., delivered the judgment of the Court.

The defendants were contractors with the Dominion Government for the performance of certain work at the Welland Canal. That canal is a Government work. The Minister of Public Works has power to "discontinue or alter any part of a public road, where it is found to interfere with the proper line or site of any public works * *; but before discontinuing or altering such public road, he shall substitute another convenient road in lieu thereof": 31 Vic. ch. 12, sec. 29, D. It became necessary in the performance of the defendants' contract to cut away the then public road at that part where the defendants were doing their works, and therefore it was provided in the specifications that, "before the present public road is cut away, or in any way disturbed, the contractor must provide another and satisfactory means for the public travel to pass"; and the defendants were to be held "legally liable and responsible for keeping everything connected with the crossing in such a condition that it can be safely used," and they were allowed by the Government \$800 for making the temporary bridge, and they did not expend upon the bridge more than about half that sum, although they paid something besides for the right of approach to the bridge. It was under these powers this bridge was put up. The bridge so constructed became a public highway, and it will continue to be such highway until its purpose has been answered by the construction and opening of the intended permanent bridge. That bridge is vested in Her Majesty. It is a bridge the Minister of Public Works for the Dominion had power to construct, or to authorize being constructed. The municipality in which it is cannot be liable for not keeping it in repair, because the municipality had not and has not any control over it. The municipal power and rights as to that bridge had been superseded by the Dominion intervention. The defendants under the Dominion authority and direction have built the bridge for the public travel, and in lieu of the former highway,

and they have been paid for so doing, and they have thrown it open to the public as a safe bridge or highway for general use.

If the defendants had built the bridge, and made a gift of it to the public, the public, if they accepted it, would take it just as it was given to them, and would have no claim upon the defendants as regarded its sufficiency or safety, or for its future maintenance or repair. But here the Crown by virtue of its statutory powers has authorized and bound the defendants for valuable consideration paid to them by the Crown to destroy the old highway, upon the condition of substituting the present bridge in its place for a certain unexpired time, and upon the condition that the bridge should be made a safe way of travel, and be maintained by the defendants, while it is used as the highway, in the like condition, and the defendants have acted under that authority and engagement, and have made the bridge and opened it to the public as a safe and sufficient structure for travel as a highway, and have bound themselves to maintain it as such; and under these circumstances we are of opinion that the defendants, independently of their contract with the Minister of Public Works, would be, and are bound by the law of this Province, for the sufficiency of the bridge which they have substituted for the highway they have destroyed.

If the defendants are responsible to that extent, or to the extent declared in the specifications, the only question is: Is there any difference between these two expressions of liability?

A municipal corporation is liable on default to keep their roads, bridges, and highways in repair, and the alleged weak and insufficient state of the railing or fence along the bridge may be considered a default of repair, if the alleged defect be true. The statute does not prescribe in terms the state in which roads or bridges shall be made and maintained by municipalities, but it has always been considered that they should be in such a state that they shall be reasonably safe and fit for the public use and travel.

Now that is in effect just what the specifications require the contractors shall do; and we can see no objection to the learned Judge telling the jury to be governed in their finding by what a municipality is required to do, so long as it is in effect just what the contractors have engaged to do.

But we are of opinion that when the learned Judge told the jury that the defendants were bound to do with regard to the bridge just what a municipality would be required to do in erecting a temporary bridge for use while completing a permanent one in place of one which had been carried away, they may have believed that a want of stability or safety in some degree might be allowed in a temporary bridge which would not be permitted in a permanent bridge, without an explanation to what extent, or in what manner, or why there should be that difference, and whether it is or should be a universal rule in cases of the kind, or one which applies only in certain cases, and whether this was one of these cases.

The word "temporary," is opposed to that which is "permanent." It has relation to the duration of time. It has nothing to do with want of strength or safety. A structure may be temporary, and yet be strong and safe. A house which has the lower part of its front removed, and is shored up, may and ought to be sufficiently safe by the temporary shoring to prevent it falling down, and the shoring may be as strong and safe for that purpose while it is in use as the original wall was. A bridge which has a bent or arch broken, may be stayed for a time by supports until it is repaired, and, although the supports are but temporary, they should be strong enough to sustain the bridge in safety.

Just so here, the bridge should have been sufficiently strong for the purpose for which it was designed, and should have been made and maintained so that it could be safely used as a highway. The materials of it need not be of a kind or quality, nor need they be put together with that care or security, nor need the workmanship or finish be of a class, which would be necessary in a permanent

work. Nor would it be required that a merely temporary work should be secured against wear and tear, exposure to the weather, and the like, as a permanent erection ought to be as far as possible. But in every case, and under all circumstances, the temporary work should be safe and sufficient for the purpose it was intended, and for which it was used, and it is no excuse that it was not safe and sufficient, that it was only a temporary work.

I think therefore that the case should go again to another jury, and that they should be told that, although a temporary bridge need not, and cannot be required to be constructed in the manner, or with the care and finish, or materials of a permanent bridge, yet a temporary bridge, equally with a permanent bridge, must be constructed to answer the purpose for which it was intended, and, if it be the substitute for a highway, that it must be constructed and maintained in such a manner that it should be a safe and strong roadway for the public travel; and the jury should be asked to say whether the bridge at the time of the accident, was a structure of that kind. They will not be confused then with the idea, as I fear they were to some extent on the former trial, that a temporary bridge as opposed to a permanent bridge, implies inferiority in strength and safety as well as in the other qualities and construction of a permanent bridge.

We abstain from expressing any opinion upon the evidence, or upon the verdict which was rendered.

Rule absolute.

MAY V. THE STANDARD FIRE INSURANCE COMPANY.

Fire insurance—Condition forfeiting policy for seizure of goods under execution or for dispute as to title—Whether just and reasonable—Seizure.

A special condition of a policy of insurance effected by one K. on certain goods, provided that if the insured property should be levied upon or taken into possession or custody under any legal process, or the title be disputed in any proceeding in law or equity, the policy should cease to be binding on the insured. The goods, prior to the insurance being effected and up to the time of the loss, were mortgaged by K. to the plaintiff, to whom the loss was made payable. After the making of the policy, an execution at the suit of one D. against K. issued against his goods, under which the goods, which were in K.'s possession, were seized, but on a bond being given for re-delivery of the goods upon request to the sheriff, the seizure was withdrawn, and the goods were left in K.'s possession.

Heid, that there was a valid seizure, for the goods being in K.'s possession, the sheriff, so long as he was not forbidden doing so by the mortgagee, might properly seize them in *corpore*, and, if need be, take them out of K.'s possession, and that what occurred subsequently could make no difference.

Held, also, that that part of the condition which referred to the levy or taking possession of the goods under legal process, was, on the particular facts of this case, just and reasonable, for although the condition in its generality might be unjust and unreasonable as applying to all seizures, legal or otherwise, yet that it was divisible so as to be just and reasonable when applicable, as here, to a legal seizure. The policy was therefore held to be avoided.

Per WILSON, C.J.—The other part of the condition referring to the title being disputed, &c., was not just and reasonable.

ACTION by the plaintiff on a fire insurance policy granted to John Kilpatrick, alleging a loss by fire, the policy containing a provision that "Such loss or damage as shall have been ascertained and proved to be due under this policy to John Kilpatrick, shall be payable to Samuel May of Toronto, as his interest shall appear."

The only plea which it is necessary to refer to is the seventh, which was as follows: that the policy was made upon the condition endorsed thereon, that if the property insured should be levied upon or taken into possession or custody under any legal process, or the title be disputed in any proceeding at law or in equity, the policy should cease to be binding upon the Company; and that after the making of the policy and the issue thereof to the said John Kilpatrick the sheriff of the county of Wellington, under

and by virtue of a writ of *fieri facias* issued out of the County Court of the county of Wellington, at the suit of George Daniels, plaintiff, against the said John Kilpatrick, defendant, and to the said sheriff directed and delivered, did seize and take in execution the goods and property of the said John Kilpatrick, in the declaration mentioned, by reason whereof the said policy ceased to be binding on the defendants. The plaintiff took issue upon this plea.

He also replied : that the said condition is not one of the conditions authorized by the statute, and no seizure or levy ever took place whereby the possession of the said goods, or the interest of the plaintiff therein, was or has been in anyway affected, or the defendants in anyway prejudiced ; and that under such facts the said condition was not and is not a just and reasonable condition. Issue.

The cause was tried before Osler, J., and a jury, at Toronto, at the Spring Assizes of 1879.

It was proved that the goods, prior to the insurance being effected, had been mortgaged to Samuel May for the sum of \$1,300, and that the amount of the loss, as stated in the declaration, was to be payable to him.

It was also proved that after the making of the policy, an execution at the suit of one George Daniels issued against the goods and chattels of Kilpatrick.

The additional evidence, so far as material, is stated in the judgments.

At the conclusion of the case the parties agreed that there was nothing to go to the jury on the seventh plea, which was in fact proved. The learned Judge said his impression was that the condition was a reasonable one ; but he entered a verdict for the plaintiff, leaving the defendants to move to enter a verdict for them.

In this term, May 20, 1879, *Bethune*, Q. C., obtained a rule *nisi* accordingly.

During the same term, June 2, 1879, *McMichael*, Q. C., shewed cause. It is only necessary to refer to the seventh plea, as the defendants' counsel states that he does not pro-

pose to argue any other part of the case. The evidence shews that the goods were mortgaged by Kilpatrick to the plaintiff before the date of the policy, and that they continued subject to the mortgage until their destruction by fire. The seizure made of the goods by the sheriff affected only the interest of Kilpatrick, which was a mere equity of redemption, and such a seizure was not within the terms of the condition. The seizure of the goods was not in this case a seizure of Kilpatrick's goods, but of the plaintiff's goods, and so also that was not a breach of the condition. The mere fact of a seizure and leaving the possession after taking a bond to the sheriff for the re-delivery by Kilpatrick of the goods to the sheriff, was not a seizure within the meaning of the condition: *Nash v. Dickenson*, L. R. 2 C. P. 252; *Gladstone v. Padwick*, L. R. 6 Ex. 203; *Blades v. Arundale*, 1 M. & S. 711; *Addison on Torts*, 4th ed., 652; *Rogers v. Kennay*, 9 Q. B. 592. The condition is not, under the circumstances, a just and reasonable one.

Bethune, Q. C., contra. There was a valid seizure made by the sheriff: *Livingstone v. Western Ass. Co.*, 16 Grant 9; *Oxford Building Society v. Waterloo Mutual Ins. Co.*, 42 U. C. R. 181; *Mechanics' Building and Savings Society v. Gore District Mutual Ins. Co.*, 3 App. 151. The cases of *Peek v. North Staffordshire R. W. Co.*, 10 H. L. Ca. 473, 571; *Sands v. Standard Ins. Co.*, 26 Grant 113; *Ballagh v. Royal Mutual Ins. Co.*, 44 U. C. R. 70; *Morrow v. Waterloo County Mutual Ins. Co.*, 39 U. C. R. 441; and *Gregory v. West Midland R. W. Co.*, 2 H. & C. 944, shew that the just and reasonable conditions required to be proved under the Railway Traffic Act in England, are such conditions which are in themselves, and in the abstract, apart from the particular circumstances of any given case, just and reasonable generally.

June 27, 1879. WILSON, C. J.—I think the cases last referred to by Mr. Bethune shew that the conditions therein referred to must be just and reasonable in the particular

case, according to the facts and circumstances of such case.

I may say here that in *Morrow v. Waterloo County Mutual Ins. Co.*, 39 U. C. R. 441, I was of opinion that the fact that the conditions were just and reasonable need not be averred in the plea which set up the special or variation conditions; but I am of opinion, upon looking more fully into the cases, especially *Peek v. North Staffordshire R. W. Co.*, 10 H. L. Ca. 473, 4 B. & S. 627; and *Gregory v. West Midland R. W. Co.*, 2 H. & C. 944, that the plea setting up such special conditions should shew what the conditions are that it may be seen whether they are just and reasonable or not.

I am of opinion there was a seizure of Kilpatrick's goods by the sheriff. The plaintiff said "the sheriff sent his bailiff there, and he made a seizure." A note was given in settlement, and the seizure was withdrawn.

The bailiff said he "went through the form of a seizure. * * I made a formal seizure," and a day or two after he took from Kilpatrick and a surety a bond for the safe delivery up of the goods on request to the sheriff. That bond recites a seizure had been made.

At the trial it was treated by all parties as if the seizure had been made, and the cases referred to on the argument shew that less than was done in this case would constitute a levy upon the goods. The sheriff had the right also to seize and sell the interest or equity of redemption in such goods: Consol. Stat. U. C. ch. 22, sec. 260, and the earlier Act there referred to, and R. S. O. ch. 66, sec. 27.

The mortgagor and execution debtor Kilpatrick was in actual possession of the goods at the time of the seizure, and I see no objection to the sheriff seizing them *in corpore* and taking them out of the debtor's possession, if need be, so long as he is not forbidden doing so by the mortgagee, if the mortgagee is entitled to the immediate possession of the goods. The property insured was, in the words of the condition, "levied upon or taken into possession or custody under legal process," and that levy avoided the policy, if the condition in question be held to be a just and reasonable condition under the circumstances of the case.

In *Sands v. Standard Ins. Co.*, 26 Grant 113-115, Proudfoot, V.C., held the condition to be neither just nor reasonable.

Mr. Justice Osler, at the trial, was of opinion it was just and reasonable.

He acted on the opinions of the following witnesses:—

Robert Maclean, the inspector of the Scottish Commercial Insurance Company, who had been engaged for thirteen years in the insurance business, said: "I know that insurance people generally look upon goods under seizure as not desirable to insure. I suppose they think that the hazard is greater in that case."

Mr. Rowland, who had been engaged in the insurance business as inspector, and in various other ways, for a number of years, said: "We always required notice of executions and things of that sort, because we consider the moral hazard is increased thereby. * * We do not like to insure property in seizure, and, if it becomes so, we want to be informed of it. * * According to our policy we do," (that is, require notice of a seizure that was settled at once.) "After the property goes into the hands of an assignee or sheriff, we require to have notice of it. * * If a man is doing a profitable business we consider that the moral risk is very much better than if he is in the hands of an assignee or sheriff, and the risk has been predicated from that condition; and, therefore, if the risk is enhanced we want to know it. This is very general with insurance companies."

T. C. Livingston, inspector of defendants' company, said he had large experience, probably for eighteen years. He was asked, "Is it considered material on the part of insurance companies to know when execution or legal process issues against property insured?" and answered, "Yes, very material. In fact I do not know any company that would insure a risk under that state of affairs."

C. R. Peck, who stated that he had been connected with the Phoenix Mutual here, and had been so, for about five years, as also had been agent for other companies, said: "It is

considered material by companies in general to know if there is any levy upon goods insured. * * We consider it material to know whether goods have been seized after we become responsible, or at the time of the taking of the application. I think our company make it essential that we should know of any such change."

Henry T. Crawford, secretary of defendants' company, said : "It is very material to know about a levy on property insured. Our usual practice is, to cancel the risk at once as soon as we know that a seizure is made. I have cancelled the risk in every instance where we have ascertained that the property is seized. We do that because we think that the hazard is increased. * * We were aware that Mr. May had the mortgage, and that the loss was payable to him ; and I suppose we knew that no seizure by the sheriff could affect his interest." Qu. "If you had been told 'that property belongs to Mr. May ; the sheriff has gone there for \$115 ; he has not left anybody in possession,' and the landlord became liable for it, do you mean to say that on that state of facts you would have cancelled the policy ?" Ans. "Yes. We would have cancelled it as soon as we had notice of the seizure. The fact of the seizure would have induced us to cancel."

In *Davis v. Eyton*, 7 Bing. 154, there was a condition in a lease entitling the landlord to re-enter as of his former estate, if the lessee should commit an act of bankruptcy whereon a commission should issue, and he should be declared bankrupt, or if he became insolvent or incurred any debt upon which a judgment should be signed, and on which any execution should issue.

See also *Doe dem. Wyndham v. Carew*, 2 Q. B. 317, a case of the like kind, although there the proviso was held void because it was insensible.

The condition relied upon in the seventh plea, that the policy should be void if the property insured were levied upon or taken into possession or custody under any legal process, could not have been called unjust or unreasonable, in my opinion, if the condition had expressed, that the legal

process should be such process as had issued against the property of the insured upon a judgment recovered against himself. As the condition is worded it would cover a seizure wrongfully and illegally made for the debt or liability of another, and it would cover a case also in which some one, for the express purpose of damaging the insured and of putting an end to the policy, had caused the goods insured to be levied upon. It would cover also a lawful seizure made of the goods for the rent of another. That is certainly not a reasonable condition in its present generality.

I cannot say it is altogether unjust or unreasonable, just as it is, so far as the company is concerned, because it is always an important matter to them that the goods should be in the custody and ownership of the insured; and, if they are taken from him, the damage and risk to the company are as great whether they have been rightfully or wrongfully taken from him. But it is unjust to the insured that the policy should be determinable by the mere wanton or illegal act of another, which the insured may have resisted as far as he could, and which he could not prevent.

It perhaps would not be unreasonable that even an illegal seizure, or one made for the rent due by another, should avoid the policy, if it were added, that if the insured did not within so many days notify the company of the fact of seizure and of all particulars connected with it, and necessary for the company to know to enable them to decide whether they would determine or maintain the policy under such circumstances, and that if upon receiving such notice the company notified him within a certain time whether they had elected to vacate or to allow the policy to stand, and that if they did not answer within that time the policy should be presumed to be a continuing one. In such a case the insured would not be doing more than was right towards the company, and if he failed to do that and he lost his insurance, it would be occasioned only by his own act and neglect; and if he did notify the company and they elected to avoid the policy, he would know in a definite time whether he had the protection of his policy or not; and

the condition could not, in that case, be sprung upon him months after a seizure was made, which it may be never should have been made, and which may not in any way have affected the risk.

A seizure for the insured's own debts or liabilities is attended with other considerations which may well enough avoid the policy at once, if made upon a judgment, or the like, validly recovered or enforceable against him, because the fact of a judgment being recovered, or an enforceable claim standing against him, is a proceeding of which the party must have had notice, and it is very good evidence of the insured not being in a quite solvent state, especially in the case of a judgment; and these are matters, just as bankruptcy is, material for companies to know. But an *ex parte* seizure by attachment as an insolvent debtor, or the like, should not be so dealt with.

I think, upon the whole, although not quite free from doubt, that the condition is not in some respects unjust or unreasonable for the company to require. But at the same time I think it is not quite just and reasonable, as it now stands, for the insured; and yet it could, I think, be made a just and reasonable condition for both parties, if it were amended somewhat in the manner I have indicated.

The other part of the condition, which is not now in question, that the policy should be void "if the title of the property be disputed in any proceeding at law or in equity," is, as it stands, in its generality very unreasonable.

Now the question is, if the condition is unreasonable because by its present generality it applies to all seizures, however illegal and unfounded, can it be restricted for the purposes of this suit on an issue in fact to a levy made by lawful process against the goods of the insured, he himself being the execution debtor, if the condition so restricted would then be just and reasonable?

I am inclined to think it may be so restricted for the purposes of this suit, and, if so restricted, that the condition is not unjust or unreasonable. Why should this condition, which has been expressly agreed to between the parties,

and which is not illegal, be held to be wholly void when it can be applied to cases which, and to persons who, justly and reasonably come within these provisions? It may be very unjust and unreasonable if such a condition be applied to every person who, and to every case which, can be brought within its most extended construction; but it may not be so if it be applied to such cases and persons as are within its comprehensive provisions, when just such persons and cases could have been provided for by a more qualified condition having the like effect as the present condition in its properly restricted application.

A seizure of the goods of the insured under an execution upon a judgment obtained against himself, is, as I have said, a case in which it may be just and reasonable the policy should be avoided if the defendants desire it. That case is within the general language of this condition. The condition is sought to be used to that extent in this suit, and no further; and I do not see why in this case, under these circumstances, it should not be valid to that extent, although it would be unjust and unreasonable in other cases to push it further.

The condition which the Judge is to try under the statute is the one which is pleaded, and in this case it is, whether the seizure of a debtor's goods, which are insured, under an execution against him for his own debt, is a reasonable condition to be exacted by the company, and as the evidence shewing the execution upon a judgment duly recovered against the insured, and as I have already said, I think it is. It makes no difference that the seizure was abandoned soon after it was made and a bond taken to deliver up the goods on request, instead of leaving the bailiff in possession, and that no sale was actually made, and that the debt was not very large—only about \$120—and that it was paid not many days after the seizure. The very thing happened which it had been agreed upon should, if it did happen, avoid the policy; and the fact that the debt was not large strongly indicated that the insured was not in a good financial position.

The rule, I think, should be made absolute to enter a verdict for the defendants on the seventh plea.

OSLER, J.—The person insured under this policy is John Kilpatrick. In the body of the policy herein the following provision appears : "Incumbrance, \$1,300. Such loss or damage as shall have been ascertained and proved to be due under this policy to John Kilpatrick, shall be payable to Samuel May, of Toronto, as his interest shall appear." May, although not the insured, maintains this action at law under the 4th section of the Administration of Justice Act as having a purely money demand : *Bank of Hamilton v. Western Assurance Co.*, 38 U. C. R. 609.

But the question whether the fifth additional condition is just and reasonable must be considered as regards Kilpatrick's position, not that of May, for under such a policy as this, the only right the latter has is to receive so much money as shall be shewn to be due to the former in respect of it, and his security may be totally defeated by any breach of conditions, whether statutory or additional, committed by Kilpatrick : *Livingstone v. Western Assurance Co.*, 16 Grant 9.

Then is this a reasonable and just condition to have been imposed on Kilpatrick ?

It may be divided into three parts : (1) "When property insured by this policy, or any part thereof, shall be alienated, or in case of any transfer or change of title to the property insured, or any part thereof, or of any interest therein, without the consent of this company endorsed hereon ; (2) or if the property hereby insured shall be levied upon or taken into possession or custody under any legal process ; or, (3) the title be disputed in any proceeding at law or in equity, this policy shall cease to be binding on the company." The additional conditions are prefaced by the notice required by the Act, that they are in force *so far as* by the court or jury before whom a question is tried relating thereto, they shall be held to be just and

reasonable *to be exacted* by the company. The first and third clauses of the condition now in question may therefore be disregarded, as nothing turns upon them, so that we have only to consider the second clause. As it stands, the policy would be avoided by any levy upon the property, or by its being taken into possession or custody under any legal process, whether such levy or taking was legal or illegal, and whether under an execution against the owner on a valid judgment against him, or a mere trespass by a seizure of them under a judgment recovered against a third party. Nay, even if the plaintiff had been driven to resort to an action of replevin to recover them, it is possible that such a taking would strictly be within the terms of the condition, and avoid the policy.

The mischief which was intended to be remedied by the Fire Insurance Policy Act, was that of insurance companies imposing upon the insured a number of onerous conditions under one or other of which it was almost always in the power of the company to defeat his claim, no matter how just, and a set of conditions were settled by a commission, and embodied in the Act, which it was thought would sufficiently protect both parties to a policy. If, however, the insurers chose to exact additional conditions, or to vary those which the Legislature had deemed sufficient, they were at liberty to do so, but the *onus* was cast upon them of satisfying the Court or Judge before whom a question relating thereto might be tried, that the condition or variation was just and reasonable.

The evidence at the trial established the fact, which is indeed almost self-evident, that the circumstance of the issue of an execution against the insured and levy of his goods thereunder, is one very material to the risk and to be known to the insurers; and if the second clause of the condition now under discussion had in terms been directed to such a case as that, I should have felt no difficulty in holding the condition in this respect to be just and reasonable.

Whatever I may think of the justness and reasonable-

ness of the conduct of the defendants' in taking advantage of this condition in order to defeat what appears upon the evidence to be a just claim, and not even remotely arising out of any breach of it, I must nevertheless give effect to their objection, if the condition, upon any fair construction of it, is capable of being supported. They shall have "all justice."

In determining whether a condition is just and reasonable a Judge is not to be confined to the words of the condition itself, but is to look at the circumstances or state of facts to which it is sought to be applied. A condition apparently very reasonable may in its application to a certain state of facts become very unreasonable: *per Martin, B.*, in *Gregory v. West Midland R. W. Co.*, 2 H. & C. 944.

It must be extremely difficult to frame a condition which shall in terms exactly meet all cases which may arise. If, when framed in general terms, it is applied only *so far* as it is just and reasonable in each particular case, the plaintiff obtains, I think, the utmost measure of relief which can be demanded by him.

If, as in this instance, the condition is not to be rejected as a whole because the first and third clauses are objectionable, why is not the second clause, which covers all cases of levy or seizure, to be held divisible, and held to be just and reasonable under the circumstances which exist here, and unjust and unreasonable when it is sought to apply it to cases where the seizure or levy is, *e. g.*, a mere trespass?

I think we are bound to construe this clause of the condition in the manner I have indicated, and not to reject it entirely, because it is, in its application to some cases which may come within it, unreasonable.

For these reasons I am of opinion that the rule should be made absolute. See *Browne* on Carriers, p. 180; *Gregory v. West Midland R. W. Co.*, 2 H. & C. 944; *Peek v. North Staffordshire R. W. Co.*, 10 H. L. Ca. 571.

GALT, J., concurred.

Rule absolute.

CRANDELL QUI TAM v. NOTT.

Qui tam action—Property qualification under R. S. O. ch. 71, sec. 7—Reception of improper evidence—Form of rule nisi—Misdirection—Equitable estate—Wife's estate—Tenancy in common.

In a rule *nisi* for a new trial for the admission of improper evidence, it is not sufficient to state merely that improper evidence has been admitted, but the evidence objected to should be specified, and the objection should be taken at the trial.

In a *qui tam* action against defendant for acting as a Justice of the Peace without the necessary property qualification required by R. S. O. ch. 71, sec. 7, the defendant was called as a witness on his own behalf and gave evidence as to the value of the property on which he qualified, and the learned Judge in charging the jury told them that, generally speaking, the owner of property had the best opinion of its value.

Held, there was no misdirection; for that the jury were not told that they were to be guided by such opinion, or that it was most likely to be correct.

In a penal action, where the jury find for the defendant, a new trial will not be granted merely because the verdict may be deemed to be against the evidence or weight of evidence; but it is otherwise where the verdict is in contravention of the law, arising either from the misdirection of the judge, or from a misapprehension of the law by the jury, or from a desire on their part to take the law in their own hands.

Where, therefore, in such *qui tam* action, which is looked upon as a penal action, the jury, though greatly overvaluing the property, found for the defendant, but none of the above considerations arose, a new trial was refused.

Semble, that the ownership of an equitable estate in land is sufficient to enable the owner to qualify thereon under the statute.

Where, however, a husband caused certain land to be conveyed to his wife by deed, absolute as between them, and without any declaration of trust in his favour: **Held**, that though the conveyance might be void as against his creditors, yet that the husband could not qualify on the land, for, so far as he was concerned, the absolute property therein was, by his own act, vested in his wife.

It was urged in term that the jury in their finding had treated the defendant as the sole owner of certain part of the property, whereas it was owned by himself and son as tenants in common, and that his moiety was not of sufficient value. At the trial the deed to the father and son was simply produced without the point as to the tenancy in common being taken, and it was proved that the son had afterwards joined with the father in a mortgage of the land.

Held, that the objection could not be entertained, for if taken at the trial, such an explanation might have been given as would have shewn there was no foundation for it; but, even if such ownership did exist, the question of value being for the jury, it could not be assumed that in estimating such value they had disregarded the point.

THIS was an action brought against the defendant to recover fifteen penalties of \$100 each, under R. S. O. ch. 71, for acting as a Justice of the Peace without the necessary property qualification.

The cause was tried before Morrison, J. A., and a jury, at Whitby, at the Spring Assizes of 1879.

The first four counts were abandoned.

It appeared that the defendant took his oath of qualification in 1874. The property mentioned in it consisted of lots 9, 78, and 79, and lots 19, 20, 21, and 22, in the village of Port Perry. With the exception of lot No. 9, all these lots stood in the name of the defendant's wife. The defendant afterwards acquired lot No. 11.

It was admitted that if the defendant could legally qualify upon the lots standing in his wife's name their value was sufficient for that purpose.

The defendant insisted that he was really the owner of these lots; and he explained that the reason why the deeds had been made in his wife's name, was, that on paying off some mortgages upon them some years ago it was suggested that, "in case any thing should occur," it would be just as well to make them over to the wife: that he had no judgments against him, and did not anticipate any difficulties of this kind: that he had always been in possession of the lots, and had received the rents and profits, and had been assessed for them. He said that he had explained his position in regard to them to the late Clerk of the Peace, who advised him that he could qualify upon them.

The defendant's wife said, that Squire Farewell and Mr. Paxton proposed that she should have the deed as a deed of trust, so that if her husband should die she would have something: that she gave nothing for it, and she never exercised any control over the land. There was no declaration of trust in favour of the defendant.

The learned Judge stated his impression to be, that the defendant could not qualify upon these lots, but he took evidence of their value, subject to the plaintiff's objection.

The defendant also contended that he was sufficiently qualified in respect of lots 9 and 11. The former he valued at from \$250 to \$300, in 1874, and lot 11 at \$2,700, at the time the action was brought. He admitted that there might have been some "shrinkage" in the value of the pro-

perty; as to lot 9, perhaps as much as one-fifth or one-fourth; but as to lot 11, he could not say satisfactorily to himself how much.

Another witness valued lot 9 at \$300, and lot 11 at from \$2,300 to \$2,400, at the present time.

It appeared that the defendant had paid \$2000 for lot 11, and had made improvements on it since to the amount of \$400 or \$500.

The plaintiff called three witnesses, who were or had been assessors in Port Perry and the neighbourhood; one valued lot 11 at \$1,700; another at \$1,800, and the third at \$2000. They all valued lot 9 at about \$150. Their valuations of the other lots varied a good deal more.

Another witness valued lot 9 at \$175, and lot 11 at \$2000.

The defendant had mortgaged lot 11 to one Wilcox for \$1,250.

A deed was produced by the registrar, dated March 13th, 1878, from W. M. Wilcox to John Nott and William Nott, for lot 11; and a mortgage, of the same date, from John Nott and William James Nott, and Jane Nott, to William M. Wilcox, of lot 11 and lot 79, for \$1,250. The deed produced was put into the defendant's hand on cross-examination, and he said of it: "This deed only represents the amount I owe to Wilcox."

No other reference appears to have been made to it in the course of the cause.

The learned Judge charged the jury, explaining what the law required as to the qualification of a magistrate. He observed that it was a very difficult thing to arrive at the proper value of land: that generally speaking the owner of it had the best opinion of its value: that assessors were, generally speaking, unsatisfactory valuators, and that they ought not to be very critical as to the valuation put upon his property by a magistrate. He left to them the question, had the defendant between January 19, 1878, and April 16, 1878, the date of the earliest and latest convictions, pro-

perty to the value of \$1,200, independent of the property held in his wife's name?

The plaintiffs' counsel objected to the charge: that the jury should have been told that the defendant himself estimated that his property had depreciated one-fifth in value; and that the jury should not have been told that the defendant's valuation was more likely to be the correct one.

The jury answered the question submitted to them in the affirmative, and the verdict was accordingly entered for the defendant.

In this term, May 22, 1879, *Bigelow* obtained a rule *nisi* to set aside the verdict for the defendant, and to enter a verdict for the plaintiff, pursuant to the Common Law Procedure Act, on the ground that the same was contrary to law and evidence; or for a new trial, on the ground that the verdict was contrary to law and evidence, and the weight of evidence, and for the admission of improper evidence, and for misdirection of the learned Judge who tried the cause, as to the valuation of the defendant's property made by himself, and as to the defendant's own valuation being the one which should prevail.

During the same term, June 5, 1879, *Spragge* shewed cause. The property, which stood in the name of the wife, was actually the husband's, and could be reached by his creditors, and he can therefore qualify in respect of it; and, at all events, the jury, having found in the defendant's favour as to lots 9 and 11, their verdict should not be disturbed: *Fraser qui tam v. McKenzie*, 28 U. C. R. 255.

Bigelow, contra. As to lots 9 and 11, taking them at the defendant's own valuation, they are not sufficient. The defendant valued lot 11 at \$2,700, from which deduct the mortgage for \$1,250, which leaves \$1,450. The defendant and his son were tenants in common of this lot, and therefore the value of the defendant's interest could only be half of this, or \$725, and adding the value of lot 9, \$300, makes \$1,025, which is the whole value of the defen-

dant's interest, which is of course insufficient. As to the other property it was not the defendant's. He gave it to his wife. He could never reclaim it, or have the deed set aside. The fact that the creditors could do so adversely to both of them, does not give him the right to say that it is such property as the 7th section of the Act requires him to be possessed of. The only equitable interest which a magistrate can qualify in respect of is that of a mortgagor.

June 27, 1879. OSLER, J.—On looking at the short-hand writer's report of the evidence and Judge's charge there does not appear to be any foundation for the objections taken in the rule *nisi* to the admission of improper evidence, or for misdirection.

The rule does not specify the evidence said to have been improperly admitted, and is therefore in that respect insufficient; and as a matter of fact no objection on this ground appears to have been taken at the trial.

As regards the alleged misdirection what the learned Judge said was, that generally speaking the owner of property had himself the best opinion of its value. We do not understand him to have told the jury that they should be guided by this opinion, or that the owner's valuation was most likely to be correct. The direction given to the jury was not substantially different from the direction given in *Squire qui tam v. Wilson*, 15 C. P. 284, "that they ought to be fully satisfied of the value of the defendant's property before finding for the plaintiff: that he thought they should not weigh the matter in scales too nicely balanced; and that any reasonable doubt should be in favour of the defendant."

I see therefore no reason to interfere with the verdict on either of the grounds I have referred to.

Before disposing of the other grounds taken in the rule it may be as well to notice the defendant's contention, that he had a good qualification in respect of the property which had been conveyed to his wife.

The 7th section of the Act, R. S. O. ch. 71, enacts : " Except where otherwise provided by law, no person shall be a Justice of the Peace, or act as such, who has not in his actual possession, to and for his own proper use and benefit, an estate in free and common socage, in absolute property, or for life, or lease for one or more lives, or originally created for a term not less than twenty-one years in lands, tenements, or hereditaments * * of or above the value of one thousand two hundred dollars, over and above what will satisfy and discharge all incumbrance affecting the same, and over and above all rents and charges payable out of or affecting the same."

It is probable that upon a fair construction of the language of this section, it would be held that the ownership of the equitable estate in the land would be enough to entitle the Justice of the Peace to qualify when its value was sufficient. But it is not necessary to decide this point, as, in my opinion, the defendant has not such an estate in the lands conveyed to his wife. There was no declaration of trust in his favour, and it is not suggested that any circumstances exist which would entitle him to go into equity to have the deed cancelled. So far as he is himself concerned the "absolute property" in the land is vested by his own act in his wife. It is true that his creditors can reach it in equity, but that is because as to them, and so far only as is necessary to satisfy them, the deed is void; and not because he is the owner of the equitable estate.

There remains then to be considered, whether a new trial should be granted on the other grounds.

It is perfectly well settled that in actions of this nature the verdict of a jury on a question of fact properly left to them is final and conclusive, if in favour of the defendant: *Hall v. Green*, 9 Ex. 247; *Gough v. Hardman*, 6 Jur. N. S. 402; *McLellan qui tam v. Brown*, 12 C. P. 542.

In *Squire qui tam. v. Wilson*, 15 C. P. 284, the rule was granted on the ground of misdirection only.

In *Gregory qui tam v. Tuffs*, 1 C. M. & R. 310, an action for penalties for keeping an unlicensed room for dancing,

Lord Lyndhurst said, at p. 311, "It is not usual where a verdict has been found for a defendant in a penal action to grant a new trial on account of the verdict being against the evidence; but, whenever there has been a misdirection in point of law by the Judge who presided, it is a matter of course that a new trial should be granted, because they have been misled by the Judge in point of law. If, however, the jury are misled in a point of law by any other means, there seems to be no reason why their mistake in point of law should not be corrected."

In that case it appeared that the jury had undertaken to place a construction upon the Act of Parliament by which the penalties were enforced, and had found a verdict for the defendant contrary to the clearest evidence, it might be said contrary to the admitted facts.

In *Attorney-General v. Rogers*, 11 M. & W. 670, an information for penalties where it was beyond question that the defendant had committed the act which was relied upon as subjecting him to them after the statute had come into force by which they were imposed, the jury, contrary to the evidence and contrary to the direction of the Judge, found for the defendant, Lord Abinger, C. B., at p. 673, said : "With respect to the authority of the Court to grant a new trial in the case, or in any other of a similar nature, my opinion is, that whenever the Court are satisfied that the verdict of the jury is in contravention of the law, whether the error has arisen from the misdirection of the Judge, or from a misapprehension of the law by the jury, or from a desire on the part of the jury to take the exposition of the law into their own hands, it would be very mischievous to say that the Court has no power to grant a new trial, however fit they might think the case for the discretion of a jury. * * In civil cases, where the question is a mixed question of law and fact, the administration of justice requires that the case should be submitted to the jury; and the Court will not, in these cases, grant a new trial merely because they think the jury may have been mistaken in the law. Where, however, the question turns

on admitted facts, if we were to hold that we could not reverse a verdict found for the defendant we should be placing the whole constitution of the law in the power of the jury."

Is the present application brought within the modification of the general rule laid down in the two cases just referred to? Upon the best consideration which I am able to give I am of opinion that it is not.

The plaintiff urges that the jury must have treated the defendant as being the sole owner of lot 11. If he was, there is an end of the matter, for the jury might, if they pleased, have adopted the highest valuation. But it is to be observed that this question of the son's interest in the land now comes before us in a very unsatisfactory manner. None of the exhibits are produced, and no point appears to have been made about it at the trial. The deed was simply produced under which we are now asked to assume that the defendant and his son were tenants in common. It appears that the son immediately afterwards joined with the father in the mortgage now existing on the lot. Possibly had the matter been pressed, some explanation could have been given of the transaction which would have shewn that there was no foundation for the present contention.

But even if it is assumed for the purposes of the application that the father and son were tenants in common of the lot, the question of value was still one of fact for the jury. If the fact was pressed upon their attention, I cannot assume that they have disregarded it in forming an opinion as to value. If it was not, I do not see how the plaintiff can now urge it upon us.

I cannot say that the verdict is so plainly in contravention of the law, or that there has been such a misapprehension of the law by the jury, or such a manifestation of an intention to take the exposition of the law into their own hands, as to warrant us in setting it aside. I may think the jury have greatly overvalued the defendant's property, but where the verdict is against evidence or the weight of evidence

merely, and the considerations adverted to by Lord Lyndhurst and Chief Baron Abinger, do not arise, the authorities are clear that the Court will not grant the plaintiff a new trial in a penal action.

In my opinion the rule should be discharged.

WILSON, C. J.—I need only say that the authorities my brother Osler has referred to, in England, as well as here, shew that in an action of this kind a verdict for the defendant, however much it may be against evidence, and if there is no misdirection, will not be disturbed, because it is looked upon in that respect as in the nature of a criminal prosecution.

The verdict is, in my opinion, quite against the evidence, but there was not, so far as I see, any misdirection. The verdict therefore must stand. It will be well, however, for the defendant to consider whether it will be quite safe for him to act longer as a Justice of the Peace until he has improved his property qualification, for he may not fare so well in another *qui tam* action as he has done in the present one.

GALT, J., concurred.

Rule discharged.

ANGLIN V. NICKLE ET AL.

Railways—Railway Act of 1868—Freehold and leasehold lands taken—Bond to pay amount awarded—What covered by—Description of lands—Execution of award by two of three arbitrators—Validity of award—Tender of conveyance—Easement—Plea of payment into Court.

Bond given by defendants to plaintiff, after reciting the service of a notice on plaintiff by the Kingston and Pembroke R. W. Co., requiring certain of his lands therein fully described for the railway purposes, and offering \$2,000 as compensation, which plaintiff had refused, was conditioned for the payment within one month after the making of an award under the Railway Act of 1868, of the sum to be found due him thereby, for damages sustained by him, and compensation due him, by reason of the railway company taking and retaining possession of his land, and for interest and costs lawfully payable to the plaintiff. The plaintiff's lands consisted of freehold and leasehold lands, the latter being held under leases from year to year, terminable by three months' notice, but, if resumed before the expiration of 15 years from the commencement thereof, which would be on the 1st of April, 1880, the lessee was to be paid for his improvements, but not otherwise. On the 29th of April, 1874, the lands comprised in the plaintiff's leases were leased to the railway company, subject to the existing leases, but with all the rights and powers of the lessors thereunder. The plaintiff, by the award, was awarded \$708.64, with \$67.22 interest, for his freehold land taken, and an annual sum of \$349.70 for his leasehold land, from the date of the company's taking possession, 26th of June, 1877, until the termination of said leases. In an action on the bond, alleging as a breach the nonpayment of the amount awarded with interest and costs:

Held, that the bond would cover the amount awarded for the freehold land, but not the annual sum awarded for the leasehold.

Held, also, that the amount awarded was less than the amount tendered; for assuming that the company, as reversioners, would terminate the plaintiff's leases on the expiration of the 15 years, the annual value up to that event, namely, for two years, nine months and four days, amounted to \$966.64, which with the \$708.64 for the freehold land, only amounted to \$1,675.18; and therefore plaintiff could not recover the costs of the arbitration.

In the award the plaintiff's freehold land was described as "the freehold portion of his lands taken."

Held a sufficient description, as it could be identified by the notice served by the company, and also by the plans filed.

The reference was before three arbitrators, and the award was execute by two of the three only. It appeared that at a meeting of the arbitrators a rough sketch of the award was drawn up and read over to them, and was agreed to and signed by two of them, but dissented from by the third; and on the following day the formal award in the terms of the draft was drawn up and signed by the two, without reference to the dissenting arbitrator.

Held, under sec. 9, sub-sec. 17 of the Railway Act, 1868, that the award was invalid; and, *semble*, it would be so apart from that Act.

Held, also, before suing for compensation awarded for land taken, a conveyance thereof must be tendered or a readiness and willingness to execute one be averred.

Held, also, that the Act vests the land in the company, and not merely an easement or right of way over the roadway.

To the action the defendants pleaded an equitable plea of satisfaction and discharge, by payment into Court, under the statute, of \$683.89, being the amount found due for compensation.

Quære, whether the plea must be treated as an ordinary plea of payment into Court in the cause, or a payment merely for the person entitled to the money. If the former, it admitted the plaintiff's cause of action *pro tanto*; but in such case the amount so paid in is considered as struck out of the declaration, and, so treating it here, a nonsuit was directed to be entered.

ACTION on a bond with condition, given by the defendants to the plaintiff. There was a recital that the Kingston and Pembroke Railway Company had served a notice on the plaintiff that they required the lands thereafter mentioned for the purposes of the railway, and that they had offered to pay to the plaintiff \$2,000 as a compensation for the said land, which the plaintiff had refused to accept. The condition was, that if the Kingston and Pembroke Railway Company paid to the plaintiff the sum which should be found due to him by any award made in pursuance of the Railway Act of 1868, for damages sustained by him and for compensation due to him by reason of the said railway company taking and retaining possession of the plaintiff's land, part of the front part of lot letter B, and part of water lot in front of lot B, in the city of Kingston, as set forth in the notice of the said company, and paid to the plaintiff the interest on the said sum from the time at which possession of the said land was given to the company, together with such costs as might be lawfully payable by the company, and made all such payments within one month after the making of the award in pursuance of the said Act, the bond should be void. The declaration then set out an award made on the 13th of December, 1878, by which the arbitrators awarded that the railway company should, within one month from the date of the award, pay to the plaintiff the sum of \$708.64, in full compensation for the freehold portion of his land taken, including damages to buildings, an allowance for filling up and levelling the yard of the premises on either side of the railway track of the

company running through the same, including also \$67.32 for interest, &c. ; and also that the company should pay to the plaintiff annually from the date that the company took possession of the said lands until the termination of the lease of said lands from the government to the plaintiff and one Charles Gay respectively, dated the 5th of April, 1865, the sum of \$349.70, in full of all damages to business and leasehold property, and covering allowances for a night watchman required to be kept by the plaintiff on the said premises, and for the loss of the timber carriage ; and also that the said company should pay the costs of the said arbitration, including the arbitrator's fees ; and that the costs should be taxed by the scale of the Superior Courts.

Breach : That the railway company did not pay to the plaintiff within one month after the making of the award the sum found due to him by the award for damages sustained by him, and for compensation, or the interest thereon, as in the said condition mentioned ; nor the costs of the said arbitration lawfully payable by the said company to the plaintiff, which amount to \$335.70 ; nor did the company pay to the plaintiff, within one month from the making of the award, the sum of \$708.64 ; nor the said annual payment of \$349.70, also awarded as aforesaid, one year having elapsed before the commencement of the suit since the said company took possession of the said lands, and the said lease being still in force.

Pleas :

2. That no award has been made in pursuance of the Railway Act of 1868.
3. Performance of all matters and things in the condition mentioned.
4. That the payment by the company of the amount found due by the award was made subject to the condition, that the plaintiff should give to the said company a good and satisfactory deed for the freehold portion of the land so taken by the company, yet the plaintiff did not give or tender to the company a good and satisfactory deed of the said land.

5. That the arbitrators did not lawfully award any costs to be paid by the said company, nor did the company become liable to pay any costs on any of the matters in the declaration mentioned.

6. On equitable grounds: that after the last pleading in the action, the said company satisfied and discharged the plaintiff's claim by payment into Court in pursuance of the statute in that behalf of the amount of money found due to the plaintiff for compensation, by reason of the said company taking and retaining possession of the said land, and also of the interest upon the said sum of money from the time at which possession of the said land was given to the company, together with such costs as were lawfully payable by the company, and all interest in respect thereof. Issue.

The cause was tried before Cameron, J., without a jury, at Kingston, at the Spring Assizes of 1879.

The evidence was to the following effect:—The notice from the company specifying the lands they required was dated 26th of June, 1877. The signatures to the award were admitted, but not the execution of it. There were three arbitrators. Drennen, the arbitrator appointed by the plaintiff, dissented, and the award was made by the other two. It was drawn up roughly and signed by the two arbitrators in the mayor's office. The formal award was signed next day. The company took possession of the land on the 26th of June, 1877, and commenced work upon it.

At the close of the plaintiff's case a nonsuit was moved for, because no deed had been given or tendered to the company of the land; and that the award had been executed by only two of the arbitrators, the third arbitrator having no opportunity of signing it.

Drennen was then allowed to be called for the plaintiff. He said: "I was present at the meeting when the arbitrators discussed and arrived at their award. I was asked to concur in it, but I refused. I saw the minutes arrived at in the Mayor's office, and I objected to sign them. I never was asked to sign the award. I never saw it before. I

was told at the meeting what the award would be. I was present when they passed the resolution signifying what the award would be. It was read to me at that meeting. I refused to sign it. It would have been useless to ask me to sign that award."

For the defence it was contended that more had been tendered than was awarded, and that the costs were given by the statute to the defendants. These costs had been taxed at \$750.45. That amount the defendants deducted from the sum they understood to be meant to be paid by the defendants under the award.

That amount was made up as follows :

Award, value of the freehold	708 64
Two years rental of the leasehold..	699 40
<hr/>	
Making	\$1408 04
and deducting from it the sum for costs of	750 45
<hr/>	
Left the sum of	657 59
which with the sum for interest of	26 30
<hr/>	
Made the balance of	\$683 89

which the defendants paid into Court under the statute. It was paid in on the 20th March, 1879. The money was paid in because other persons claimed part of the money, and because the interpretation of the award could not be agreed upon with Macdonell who was acting for the plaintiff.

The lease to the railway company was made subsequent to the leases to the plaintiff and Gay.

Thomas Wiley, said : "I am a director of stores and keeper of militia property for the Government. I have charge of the whole of the lands in Kingston belonging to the Government. I took possession of that land on the 2nd of August, 1870. The lands were transferred to me by the officer commanding the engineers. I signed receipts for those acting on behalf of the Canadian Government, and have been in possession ever since. The leases I made

were under the authority of an Order in Council. The War department has not been in the habit of terminating leases unless there is some reason for it. They are held in perpetuity. They have sold the land to other parties when the tenant was in possession. It was not brought to the notice of the department that the plaintiff had improvements to the extent of \$20,000, but it was known there were improvements upon it. These improvements were encroachments on the land without authority. The encroachments were crib work and filling in. The lease to the plaintiff would cover the encroachments, to protect him, so that he could protect his rights to the land.

James Wilson and George M. Wilkinson, the two arbitrators who made the award, said, the leases were before the arbitrators, and it was upon them that the arbitrators considered the plaintiff's right against the railway company. They supposed the leases to the plaintiff and Gay would terminate at the end of fifteen years. The amount awarded was the full rent up to the end of these leases to the plaintiff and Gay. If the plaintiff got the full amount up to 1880, he would get the full amount awarded.

The lease to the plaintiff was made by Her Majesty's principal Secretary of State for the War department under the statute respecting short forms of leases, of the property therein described in Cataraqui Bay, for the term of one year, to be computed from the 1st of April, 1865, and from thenceforth next ensuing and fully to be complete and ended, and so on from year to year until determined as therein mentioned, at the yearly rent of one shilling, in half yearly payments of six pence sterling.

"Provided always, and it is hereby agreed, that the demise may be determined by either party giving to the other a notice thereof in writing, three months before the expiration of the first or any subsequent year, or the party of the first part may determine the demise at any time by a demand of possession of the said leased premises or any part thereof. Provided that in such case the party of the second part shall be entitled to receive from the party of

the first part the value of any improvements on the said land, if resumed within a period of fifteen years from the date hereof, which shall be determined by the valuation of two indifferent persons, one to be chosen by each party, and in case they cannot agree then the said valuation shall be fixed by an umpire to be appointed by the said two persons; and further it is hereby agreed and stipulated that after the expiration of the said period of fifteen years all improvements on the said leasehold shall become *bona fide* the property of the War department; and, if resumed, no claim for compensation shall be admissible."

There was a lease also of the same date as the plaintiff's lease, made by the same lessor, to Charles Gay, of the premises adjoining the plaintiff's for the like term and on the like conditions in all respects as the plaintiff held under his demise, and of which lease to Gay the plaintiff became and still is the assignee.

The lease to the railway company was as follows: It was dated the 29th of April, 1874, and was made by Her Majesty the Queen, acting through the Honourable the Minister of Militia and Defence, represented by Lieutenant-Colonel Thomas Wiley, director of Stores and keeper of Militia properties in Canada, and, so far as the plaintiff is concerned, it was a demise to the railway company of all the land demised to him in his lease of 1865 before mentioned. The demise was for 21 years, renewable by mutual consent, to be computed from the 1st of April, 1874, at a yearly rental of \$50. The said demise was made subject to the leases of parts of the said land and premises then in force, with all the powers, authority, and privileges "herewith assigned and transferred by the party of the first part to the parties of the second part, the parties of the second part assuming all the liabilities and taking all the rights, powers, and privileges of the party of the first part under and by virtue of the said several leases."

The demise might be determined by either party given to the other notice in writing six months before the expiration of the first or any subsequent term, or the party of

the first part might determine it by a demand of possession for such portion of the said lands and premises as might be required for militia service, provided in such cases the parties of the second part, or their assignees, should be entitled to compensation to be determined by the valuation of two indifferent persons, one to be chosen by each of the said parties, and, in case they could not agree, then the valuation shall be fixed by an umpire to be appointed by the two arbitrators.

At the close of the case it was contended by the defendants' counsel that the award did not comply with the Railway Act, 1868, sec. 26, sub-sec. 9.; and that under the plea of no award, no tender of conveyance was made by the plaintiff; and that under the plea of payment into Court the defendants were entitled to succeed; and sec. 19 was referred to.

The learned Judge found a verdict *pro forma* for the plaintiff; namely, in debt \$10,000, and damages on the first and third breaches, for the value of the freehold, \$708.64, and interest \$16.02, equal to \$724.66; one year's rent, \$349.70, together, \$1074.36; and on the second breach, for costs, \$311.

In this term, May 26, 1879, *Britton*, Q.C., obtained a rule calling on the plaintiff to shew cause why the verdict entered for him should not be set aside, and a nonsuit entered; or why upon the law and evidence the verdict should not be entered for the defendants, on the ground that there was no valid award made; and on the ground that there was no conveyance given or tendered by the plaintiff to the Kingston and Pembroke Railway Company for the freehold portion of the land taken by the said company; and on the ground that the arbitrators had no power to award as to costs, and upon the award made the said railway company were not liable for costs under the Railway Act of 1868; or why the verdict should not be entered for the defendants upon the sixth plea, the money having been paid into Court in pursuance of the Railway

Act of 1868; or why the verdict should not be reduced by the sum of \$311, the amount of the costs of the plaintiff; or why the verdict should not be set aside, and such verdict entered upon the law and evidence as may be just between the parties.

During the same term, June 4, 1879, *Macdonell* (of Kingston) shewed cause. As to the making of the award. Although only two of the three arbitrators signed the award, and the third was not asked to sign it, it is nevertheless a valid award, because before the award was drawn up a rough sketch of what the award was to be was prepared and read over in the presence of the three arbitrators, and while the two who made the award agreed to the contents of the rough sketch, the third arbitrator disagreed to it, and it was then understood at that, the final meeting, he would not join in the award which the other two were to make in accordance with that sketch, and the award was formally prepared the next day, and was duly executed by the two concurring arbitrators: *Russell on Awards*, 5th ed., 213-216; *White v. Sharp*, 12 M. & W. 712; *Re Pering and Keymer*, 3 A. & E. 245. It is objected, then, that the award is invalid, because it does not sufficiently describe the land taken from the plaintiff otherwise than by stating it to be "the freehold portion of his land taken." But the notice describes the land taken as being part of water lot B in Kingston, embracing fifteen feet on each side of the centre line of the railway, "as now marked out by posts on the ground," and that is sufficiently certain. It is said the plaintiff did not tender a conveyance to the railway company of the land. The plaintiff was not bound to do it; and, so far as these defendants are concerned, they can raise only such matters to which the award relates, and the award does not make it necessary the plaintiff should tender a conveyance before claiming his compensation. The statute makes the award and payment into Court the title of the company. The statute does not vest in the company the freehold or ownership of the land, but only an easement in their roadway, although such

companies may acquire a title to the land itself in some cases and for some purposes, as for the erection of stations and warehouses, and the like: *Badger v. South Yorkshire Railway and River Dun Co.*, 1 E. & E., in Ex. Ch., 359. As to the costs. They were rightly awarded to, or are rightly payable to, the plaintiff under the statute. The railway company offered the plaintiff \$2,000. The plaintiff has had \$708.64 awarded to him for the freehold property, and the yearly sum of \$349.70 for the leasehold land from the 26th of June, 1877, the day the company took possession of it, until the termination of the leases from the Government to the plaintiff and Charles Gay, respectively. The plaintiff contends that, although on the 1st of April, 1880, he will not be entitled to compensation for his improvements, if his lease be then duly terminated by notice or by a demand of possession, yet until such notice or demand of possession be given, he is entitled to consider his lease as one which may be continued in perpetuity, and that the value of it should be computed upon that basis; and if it be so computed the value of it will far exceed the difference between the \$708.64, the value of the freehold, and the \$2,000 offered by the company on the service of their notice, and so in that way "the sum awarded is greater than that offered;" and the costs therefore are to "be borne by the company": Railway Act 1868, 31 Vic. ch. 68, sec. 9, sub-sec. 19, D. The company should also have discriminated in their offer between the freehold and the leasehold land, and as they did not do so the offer must be considered as no offer: *Martin v. Leicester Water Works Co.*, 3 H. & N. 463; *Re Balls and Metropolitan Board of Works*, L. R. 1 Q. B. 337.

Robinson, Q. C., contra. If in ordinary cases the declaration by one of three arbitrators at the final meeting of the arbitrators at which the terms of the award are recited that he declines to be a party to such terms, is a dispensation with the necessity of presenting the formal award to him containing such terms, which is drawn

up when he is not present, and executed by the other two in his absence, and such an award is a valid award, that is not the state of facts in this case. The award is regulated by statute. The Act of 1868, 31 Vic. ch. 68, sec. 9, sub-sec. 17, D., declares that "no such award shall be made or any official act be done by such majority, except at a meeting held at a time and place of which the other arbitrator has had at least two days' notice, or to which some meeting at which the third arbitrator was present, had been adjourned." There was no such adjournment in this case, nor was there a notice given of at least two clear days of the time and place where and at which the signing of the award would take place, which was an "official act" to be done, and which the majority did contrary to the provisions of the statute; and it was certainly a case in which an award was made, and the statute says that "no such award shall be made" but upon notice or adjournment as aforesaid. Railway companies under our statute take the land itself, and not only an easement in it. The award does not properly describe the land as sec. 9, sub-sec. 26 of the Act requires, and the notice of taking the land cannot avail, because the award does not refer to it. Nor does the award distinguish between that which is freehold and that which is leasehold; nor does it shew how much of the \$708.64 was for the freehold land alone, and how much for other matters, but embraces along with the land, and in the above sum, other allowances, as follows: "Including damage to buildings, an allowance for the filling and levelling up of the yard on either side of the track": *Re Miller and Great Western R. W. Co.*, 13 U. C. R. 582; *Martini v. Gzowski*, 13 U. C. R. 298. The plaintiff cannot sue on the award for the compensation money for the land without shewing he has given or has tendered a conveyance to the railway company; and that defence must be open to these defendants, who bind themselves that the company shall pay the money in a given time; but that does not relieve the plaintiff from performing on his part all necessary conditions precedent to entitle

him to claim the money from the company : *Cawthra v. Hamilton and North Western R. W. Co.*, 41 U. C. R. 187 ; *Guardians of East London Union v. Metropolitan R. W. Co.*, L. R. 4 Ex. 309. It is not required that the award should contain such a condition, and the fourth plea does not say the award does make it a condition, that the plaintiff shall convey the land to the company before he claims his compensation. The plea sets out the condition relied upon as a settled condition and defence in law. It is said if the notice does not contain a proper tender it is to be considered as if no tender had been made, and in such a case the company always pays the costs. The notice, however, does contain a good and sufficient tender of the sum of \$2,000, which is more than the plaintiff can possibly make out as the value of his freehold and leasehold lands. The property held by the plaintiff upon such a lease as he has, determinable at any time on a demand of possession, and to be given up without payment of any kind, if it be not determined until after the 1st of April, 1880, cannot be of much value, and cannot possibly be valued as a lease in perpetuity because it was made by the Crown. The company has the Crown rights at present in that land, and they will certainly not allow the plaintiff to continue there longer than the 1st of July next, at which time they can take the land without making any compensation for improvements. The yearly rental to be paid to the plaintiff is not for the land alone, but it includes "all damages to business and the leasehold property, and covering allowance for a night watchman, and the loss of the timber carriage;" and the allowance made for these different items should have been separately distinguished. The cases shew that arbitrators should sign the award at the same time and place, in presence of each other, because it is a judicial act, and should be done while all have an opportunity of expressing an opinion upon what they are doing, for until the last moment of their acting as arbitrators, they are entitled to each other's advice, and up to that time they may, if they please, change their

minds : *Stalworth v. Inns*, 13 M. & W. 466 ; *Re Smith et al. v. George*, 12 U. C. R. 370 ; *Wade v. Dowling*, 4 E. & B. 44 ; and if Drennen, the third arbitrator in this case, should have had the award presented to him for signature, although he had declared before that he would not agree to it, the award must be bad ; and the award should have been presented to him, as before stated, under the Railway Act. If the defendants are entitled to the costs of the arbitration, because the sum awarded was less than the sum tendered, they were justified in deducting such costs from the amount awarded, and paying the balance only into court : Railway Act of 1868, sec. 9, sub-sec. 19. The arbitrators had no power to award a yearly rental. In any event these defendants are not liable upon their bond for such rent. *Murray v. Thompson*, 35 U. C. R. 28, is expressly in point. It is said the lease to the railway in 1874 by the Canadian authorities is invalid, because the transfer was not effected until the passing of the 40 Vic. ch. 8, D., and that the immediate reversion must still be considered as vested in the Crown ; and that the plaintiff's leasehold title is of more value, because more secure from being determined than it would be if the company were the immediate reversioners.

June 27, 1879. WILSON, C. J., delivered the judgment of the Court.

The case was argued at very considerable length. We shall not find it necessary to determine what title, if any, passed to the railway company by the lease of 1874, because, as regards the annual rent awarded to be paid by the company to the plaintiff, the defendants, who are sued upon their bond, cannot be made responsible. The condition of the bond is, that if the railway company should pay to the plaintiff the sum which should be found due to him by the award for damages sustained by him, and for compensation due to him, by reason of the company taking and retaining possession of his land, and for interest, and for costs lawfully payable by the company, and should

make all such payments within one month after the making of the award, the bond should be void. That will cover the sum of \$708.64, the amount awarded for the freehold land, and the \$67.32 awarded for interest; but it cannot possibly apply to the annual payment of the sum of \$349.70 until the termination of the leases, dated the 5th of April, 1865, which may by possibility last for many years. The case referred to by Mr. Robinson on this point is exactly applicable.

The freehold property and interest are not disputed, which at the trial were stated to be \$708.64, and \$16.02, equal to \$724.66. The only question is, whether the plaintiff is entitled to recover his costs, assessed at the trial at \$311? And that depends upon the question whether the award which gave the plaintiff \$708.64, and the annual sum of \$349.70 from the 26th of June, 1877, until the termination of the plaintiff's leases, make the total compensation so awarded more or less than the \$2,000, which was the sum tendered by the company to the plaintiff on taking possession of the land? That is, Is this annual sum for the time it is to continue to be paid by the company more or less than the difference between the \$2,000 and \$708.64, or \$1,291.36?

If the lease to the railway company of 1874 be valid, they have the immediate remainder in and to the leasehold property. That leasehold is a valuable interest as regards compensation to be made to the plaintiff for his improvements, in case his lease is determined before the 1st of April, 1880; but if the lease is not determined by the remainderman until after that day, the plaintiff is bound to yield up possession without compensation for his improvements. That period is very near at hand, and there is no reason to believe the company will remain for a day longer than they can help it under the payment of the yearly demand, when they are prevented from determining it at once only from the fear of the compensation they might have to pay to the plaintiff for his improvements. Computing the amount in that way from the 26th of June,

1877, to the 1st of April, 1880, or for a period of two years, nine months and five days, the whole sum will be at \$349.70 per annum, \$966.54, and, if it be added to the \$708.64, the whole will be \$1675.18, and very considerably less than the \$2,000, which was the sum offered in the first instance by the company.

It is idle to compute the annual sum upon the basis of the lease in question being a perpetual one. It is terminable at any time on a mere demand of possession by the reversioner or remainderman ; and, if the company are such, it cannot be presumed they will continue under that onerous obligation voluntarily, when they can at any time put an end to it ; and can after the 1st of April next put an end to it without making compensation to the plaintiff for his improvements, which they become entitled then to take into their absolute possession to their own use ; and if the company have not such legal title under their lease of 1874, it cannot be doubted that the government will do what is right by confirming their former grant in whatever way it may be necessary to do so.

The costs of the plaintiff allowed at the trial at \$311 must be deducted,

If the payment of the company into Court be computed as a payment made up to the 26th of June, 1878, as regards the annual charge, and that is all that was due when the payment was made, then there was due to the plaintiff only \$683.89, and the plaintiff cannot recover at the outside for more than that amount.

As to the other objections. I am of opinion the freehold land is sufficiently described in the award, "as the freehold portion of the land taken," because that portion can as a fact be accurately proved and identified by the notice of the 26th of June, 1877, served by the railway company upon the plaintiff ; and it could be proved also by the plans filed, if necessary.

I am not clear that in ordinary cases an award executed by two arbitrators, although duly executed by them, is validly executed, when the third arbitrator was not present,

and was not notified to be present at, and had not notice of its execution, although he had declared he could not join in the award. The execution of the award is a judicial act, and such acts require the concurrence of all three arbitrators, and the dissenting one may, until the last moment before his powers are determined, that is, until the award is duly executed by all of the arbitrators, or by a majority of them, and until the dissenting one has had an opportunity to sign, or finally to dissent from it, change his mind; and the case, which was cited by Mr. Robinson, of *Wade v. Dowling*, 4 E. & B. 44, goes far, if not altogether, in support of that view.

But without expressing any other opinion upon that point as affecting ordinary cases of arbitrations, the question is, under the Railway Act of 1868, sec. 9, sub-sec. 17, which declares that, "no such award shall be made or any official act be done by such majority, except at a meeting, held at a time and place of which the other arbitrator has had at least two clear days' notice, or to which some meeting at which the third arbitrator was present, had been adjourned." Whether an award made under it, as in this case, by a majority of the arbitrators, not at a meeting held at a time and place of which the third arbitrator had at least two clear days' notice, nor at a meeting adjourned from a meeting at which the third arbitrator was present, is valid, I am obliged to say I think it is not, for the language of the statute is too positive and direct.

In cases in which the company has not delivered in a copy of the award and paid the compensation into Court so as to get a title to the land mentioned in the award, the rule must be the same as in other like cases, that the party to whom compensation for the work is awarded cannot sue for the compensation without having given a conveyance or averred he was ready and willing to execute one. When the company has delivered in the award, and paid the compensation into Court, there can be no suit against the company for the money. If, as in this case, the plaintiff contends the compensation money has not been paid, he

would require to give the conveyance, or to aver his readiness and willingness to give it. And as the company could have pleaded that defence in the action against him, it is open to the defendants to plead the like defence.

I am quite satisfied that the general provisions of the Railway Act vest the land in the company, and not merely an easement or right of way over their roadway.

The plea of payment into Court by the railway company is a curious one. The plea of satisfaction and discharge by a payment *into Court* is not a common mode of pleading. When the payment is in satisfaction and discharge, it can be made only to the person entitled to it. When the payment is made into Court, it is so made because the person entitled to it will not take it, or because it has not before been offered to him.

It is difficult to say whether this plea is pleaded as an ordinary payment of money into Court in the suit, or a payment made by the railway company for the person who establishes his title to get it out.

If it be a plea of payment into Court in this cause, it admits the plaintiff's cause of action to the extent of the payment made.

It appears, however, that in such a case, as the amount paid in is considered as struck out of the declaration, the plaintiff may still be nonsuited.

And, in my opinion, for the reasons before stated, and treating the money paid in as struck from the declaration, the rule should be made absolute to enter a nonsuit.

GALT and OSLER, JJ., concurred.

Rule absolute.

HALDAN V. THE GREAT WESTERN RAILWAY COMPANY.

Railways—Attempting to get on train in motion—Striking against truck on platform—Accident—Negligence—Contributory negligence.

The plaintiff, an intending passenger by a way train on the defendant's railway, arrived at the station just as the train, which was some minutes late, was moving out of the station, whereupon he ran quickly to the train, and seizing hold of the iron railing of one of the cars, and holding thereon, ran along the platform at the speed of the train with his face towards the car, and after the train had moved a certain distance in attempting to jump thereon he struck against a baggage truck which was close to the edge of the platform, and which had been used in taking baggage to the baggage car, and was left for a couple of minutes to bring back the baggage therefrom. By the concussion he was thrown under the wheels of the train and received an injury to one of his legs which rendered amputation nécessaire.

Held, under the circumstances, more fully set out below, the leaving of the truck on the platform did not constitute negligence on the part of the defendants; but, even if it did, the plaintiff in attempting to get on the train, as he did, was guilty of such contributory negligence as would prevent his recovering.

THIS was an action brought against the defendants for the careless management of their station at Elora, and their omitting to keep it clear for the convenience and safety of their passengers, by means whereof, while the plaintiff was upon the platform of the station at Elora, and in the act of entering and stepping upon one of the carriages of the defendants, and with the leave and consent of the defendants, became and was solely on account of the defendants' careless, negligent, and improper conduct in suffering a truck to be and remain upon the platform, in an unreasonable and improper place, and where it was highly dangerous to persons going and passing upon and along the platform or entering the carriages on the said railway, he, the plaintiff, was struck by the said truck and forcibly knocked from the said carriage with great violence on the rails of the railway, and under the wheels of the said carriage, whereby the plaintiff was greatly injured, alleging special damage.

Pleas :

1. Not guilty, by statute 16 Vic. ch. 99, sec. 10; Railway Act of Ontario, sec. 34; Public Acts.
2. That the plaintiff was not a passenger on the defendants' railway, to be carried from Elora to Guelph; nor

did plaintiff arrive at Elora to be carried and conveyed by carriages then about to proceed from Elora to Guelph, by which the plaintiff was entitled to be carried and conveyed as alleged ; nor was the plaintiff upon the platform of the station at Elora, or entering or stepping upon one of the said carriages with the leave or consent of the defendants as alleged ; nor was the plaintiff lawfully upon the platform and entering one of the said carriages as alleged.

Issue.

The cause was tried before Osler, J., and a jury, at Toronto, at the Spring Assizes of 1879.

The facts sufficiently appear in the judgment.

The learned Judge charged the jury, that on the question of damages they must consider the plaintiff's expenses, loss of income, and disability to practise his profession while he was disabled from attending to it by reason of the injury he had borne ; but that it was not a case for exemplary damages, as there was some degree of carelessness on the plaintiff's part in attempting to get on a train while in motion.

The learned Judge ruled also that there was no evidence of negligence to go to the jury ; and he said : "I will direct a verdict for the defendants with leave to the plaintiff to move to enter a verdict for him for such damages as the jury may find, if the Court think there is any evidence to be submitted to them."

The plaintiff's counsel objected to the ruling.

The jury assessed the damages at \$1,000.

In this term, May 30, 1879, *Donovan*, obtained a rule calling on the defendants to shew cause why the verdict obtained by the defendants should not be set aside and a new trial had between the parties, pursuant to leave reserved, on the ground that the verdict was against law and evidence, for that the evidence established the negligence alleged, and the injury of the plaintiff thereby ; and there was no evidence or no sufficient evidence of contributory negligence on the part of the plaintiff, and on the

evidence given the plaintiff was entitled to recover ; and for the misdirection of the learned Judge in telling the jury that there was no negligence on the part of the defendants contributing to the injury complained of, and in withholding from the jury the determination of the question of negligence on the part of the defendants ; and on the ground that the amount of damages awarded was totally inadequate to the injury sustained by the plaintiff.

During the same term, June 5, 1879, *McMichael*, Q. C., shewed cause. The learned Judge was warranted by the evidence in saying there was no evidence of negligence on the part of the defendants to be left to the jury, for there was no such evidence. It is not disputed that the case should have gone to the jury, if there had been any evidence of negligence on the part of the defendants. If the verdict is to be entered for the plaintiff the damages have been already assessed, and they are ample upon the evidence. He referred to *Martin v. Great Northern R. W. Co.* 16 C. B. 179; *Directors, &c., of Metropolitan R. W. Co. v. Jackson*, L. R. 3 App. 193 ; *Directors, &c., of the Dublin, &c., R. W. Co. v. Slattery*, L. R. 3 App. 1155.

Donovan, contra. There was no negligence on the plaintiff's part in trying to get on to the car as it was not going at a rate to make it dangerous to make the attempt to get on. The plaintiff would have got on the car without accident if it had not been for the truck which stood on the platform against which the plaintiff while going on the platform keeping pace with the train to get upon it, or while in the act of stepping or jumping from the platform on to the car, came in contact. In consequence of the violence of the concussion with the truck, the plaintiff was thrown from the platform on to the track, and the wheel of the car passed over his leg, which had to be amputated in two hours. That truck should not have been upon the platform so close to the passing cars that passengers could not get on them in safety, even although the train were slowly in motion at the time. The truck should have been removed from where it had before been in use the moment

the purpose it was required for in that particular place had been answered. The evidence shewed the truck was not wanted where it was after the train was ready to start, or had started. There was evidence, therefore, of negligence in leaving the truck where it was said to have been, and even for the short time it was allowed to remain there after its use for the time was over, and that matter should have been submitted to the jury also: *Denny v. Montreal Telegraph Co.*, 42 U. C. R. 577, 3 App. 628; *Nicholson v. Lancashire, &c., R. W. Co.*, 3 H. & C. 534; *Martin v. Great Northern R. W. Co.*, 16 C. B. 179; *Bridges v. Directors, &c., of North London R. W. Co.*, L. R. 7 H. L. 213; *Rose v. North Eastern R. W. Co.*, L. R. 2 Ex. D. 248; *Patterson v. Wallace*, 1 Macq. H. L. 748; *Hodges on Railways*, 6th ed., 623; *Wharton on Negligence*, 2nd ed., secs. 652-656; *Redfield on Railways*, 4th ed., 223.

June 27, 1879. WILSON, C. J.—I think the facts may be stated in this way. The plaintiff was at the Commercial Hotel, in Elora, when the omnibus of the hotel left with the passengers for the defendants' train from the north, at 4 p.m., on the 9th of May, on the way to Guelph. The omnibus had left the hotel ten or fifteen minutes before the plaintiff was ready to leave, and if the train had not been about seven minutes late the plaintiff would certainly have missed the train. He intended to take passage by the train for Guelph. He walked from the hotel, and as he got a little way inside the defendants' station yard, "the wicket gate" there being about seventy yards from where the train was, he heard the starting signal given, and the train began to move off southerly. He ran to the place on the omnibus platform, as it is called, where there are steps leading down to the railway siding. On that siding there were freight cars standing, but they were separated at these steps to leave an opening to persons going to the passenger train to cross the siding and reach the passenger platform, and from it to get on the cars.

The plaintiff said if these freight cars had not been

on the siding between him and the passenger cars he could have got to them diagonally, and by a shorter route from the omnibus platform; but he had no right to cross in that way, and he had no right to complain of the freight cars being on the siding so long as the usual and convenient access to the passenger train was open and unobstructed. He also said if these freight cars had not been on the siding he might before getting to the passenger platform have seen the truck upon that platform, which, he says, was the cause of the accident. The freight cars were rightly on the siding where they were, and, therefore, I make no further allusion to them. The plaintiff, from the time he began to run, ran pretty fast to the crossing place, across the siding, on to the passenger platform, and while the train was moving, and moving slowly, the plaintiff caught hold of the iron railing of one of the cars, the particular car I will try to point out, and holding on to the railing he went along the platform at the speed of the train, with his face rather towards the car, getting ready to jump on to the car, and when the train had moved a certain distance, which will depend on the part of the train where he attempted to get on, he jumped from the platform to the car, and that instant he struck against the baggage truck, as he says, and was thrown from the platform on to the line of railway, and the wheels went over his leg, so that amputation became necessary.

It is denied by the defendants that the truck was on the platform near enough for the plaintiff to strike against, as it is said it was; and, however that may be, it is said by the defendants that the plaintiff did not strike against the truck, but that his foot slipped on or from the step of the car when he jumped, and that he fell from that slip.

I cannot make out from the evidence whether the plaintiff caught hold of the hand rail at the rear of the passenger car next to the baggage car, or of the rail at the rear of the one behind that one, which would be the smoking car. I am not sure it is material to determine it.

As the learned Judge directed a verdict for the defendants,

it must be assumed there was no evidence of negligence on the part of the defendants to leave to the jury, and therefore it must be assumed for that purpose that although the truck was upon the passenger platform near enough to the cars for the plaintiff to strike against, and he did strike against it in his attempt to get on to the cars, and that but for the truck being where it was, he would not have been thrown from the platform on to the track and injured. These were not acts of negligence on the part of the defendants, or, if so, they were not the cause of the injury, but that it is to be attributed to the plaintiff's own inexcusable negligence; and it must also be assumed for the same purpose that the train was not going sufficiently fast to make it plainly or necessarily dangerous for the plaintiff to attempt to get on. It cannot, in my opinion, be affirmed that in no case when a train is in motion shall a passenger try to get upon it unless at the risk of losing all remedy against the railway for some direct negligence on their part which produces injury to the passenger at that time, and but for which negligence the injury would not have happened: *Johnston v. West Chester and Philadelphia R. W. Co.*, 70 Penn. R. 357. Although unquestionably the fact that a party was endeavouring to get on a train while in motion, must always be looked at and considered with much attention as affecting his claim to compensation more or less, or altogether, for an injury received under such circumstances. The railway companies forbid such attempts being made, but they cannot prevent them, and they could not if they were to try, unless they had a file of constables placed along the train, at each side of it, and perhaps beyond it, and unless they kept them there until the train had got far enough to make it impossible for the adventurous traveller to shoot himself on. And it cannot be contended that the companies are to stop their trains whenever a belated person is trying to get on, whether that delay has arisen from a cause beyond his control, or is the result of some incurable constitutional infirmity to be always just too late.

How then does the case stand? Have the defendants

been guilty of negligence in any respect? If so, in what does that negligence consist? If anything can be attributed as negligence, it only can be, and it is only said to have been, in leaving the baggage truck so close to the edge of the platform that the plaintiff struck against it in attempting to get on the cars, which occasioned him the injury complained of.

What then are the facts about that truck? They are that the truck was taken to the baggage car of that train with luggage upon it to have the luggage put upon the car, and the luggage was put upon it. The luggage which was on the car to be taken off at Elora, was then taken from the car and was either put on the truck or on the platform, about which there is much dispute. Whichever way the fact is seems to be of little consequence, for if the truck was the cause of the accident, it is likely it would have produced it just the same without as with the luggage upon it.

The plaintiff contends it had the luggage upon it. The case must therefore be considered as if that were the fact.

The plaintiff says the truck was near enough to the edge of the platform for him to strike against it, and he did strike against it, and he was by that concussion thrown on the railway track. That also must at present be taken to be the fact, although the evidence by no means confirms it, and there is no one but himself who says he hit it.

Assuming the truck to have been where the plaintiff said it was, and that it was the cause of the accident, was it an act of neglect on the part of the defendants to leave the truck in such a place, that is at the place where it had been used to take luggage to the baggage car, and to take luggage from it, and to leave it there for the time as in the evidence mentioned?

That evidence is as follows:—

Mr. Brophy said it could not have been more than two minutes from the time the truck was loaded until the accident happened.

Mr. Cormack, who was a passenger, said: "The truck was in use just before I went into the car. There was

only a small interval between when I saw them using it, and the occurrence of the accident;" and that interval must have been very short, for he said he went into the car just as the plaintiff was in the act of jumping on to it, and he, the witness, had not got seated when he heard the sound "down brakes," in consequence of the plaintiff's accident, so that from his account the truck must have been in use by the company until within about one minute of the happening of the accident; and these were the plaintiff's witnesses.

Mr. Murphy, a witness for the defendants, said the luggage was not on the truck when the accident happened, and he, the witness, was about to use the truck after the train left.

It does not appear to me it would have been negligence on the part of the defendants if they had put the baggage from car and left it there, so far as the plaintiff was concerned, because he was not getting on the car at the proper place for getting on, and by reason of his own neglect to be on time. The train was seven minutes late, it remained at the station three or four minutes, and he was later than that, and from the evidence from mere carelessness on his part to go to the station in time for the train, so that when he tried to get on he was by the forward motion of the train at the place where the baggage car had stood, and where the baggage, in the case I am supposing, would have stood. I do not say that the company would have been free from negligence if they had left the baggage there without just cause for an hour or two, or it may be for even a quarter of an hour. But to say that they were answerable in this case because they left the baggage on that part of the platform where it was proper for it to be, if it should have been there at all, for not more than two minutes, or for only a very small interval, would be to bind down companies to a degree of strictness to which they could not conform. And for what purpose? To help people such as the plaintiff who was culpably careless as to his own time, and who was endeavouring to get on a moving train not at the proper place for passengers, but at a place where luggage might have been expected to be.

If the baggage were on the platform, the truck was there rightly to be used in its removal. If the baggage was not on the platform, but on the truck, I think it was not wrongly there as regards the plaintiff for the time mentioned.

If the company were to blame for the loaded truck being on the platform for so short a time, then I am of opinion the plaintiff was guilty of contributory negligence in not looking where he was going or running to while holding on to the hand-rail of the car; and he says he did not look as his face was turned towards the car. And while to some extent he was doing a perilous act, trying to get on a moving train, he was bound to use more caution than in ordinary circumstances.

If the train was moving slowly, as the plaintiff says it was, there was no excuse for him not looking in the direction he was going, or was being carried by the train, for impediments in his way. If it were going fast he must have precluded himself from looking in any other direction than towards the train by reason of his anxiety to get upon it; and, in either view, there is manifest negligence on his part which produced the injury which he sustained, and which, in my opinion, prevents him from recovering against the defendants.

I come to the conclusion, then, that the defendants were not guilty of negligence with respect to the truck; and if there were negligence in that particular, that there was contributory negligence on the part of the plaintiff in attempting to get on the moving train, a dangerous and prohibited practice, as he well knew, as he had before been twice taken out from among the wheels, where he had fallen while trying to get on trains in motion, and because also he admitted to some extent, and it was proved against him, that he had been especially cautioned of the danger of such a practice.

I am therefore of opinion the learned Judge rightly decided at the trial that there was no evidence of negligence to be left to the jury, and that the verdict for the defendants was rightly entered.

It is necessary I should refer to one of the cases cited by Dr. McMichael, for the defendants, because, although a decision of the House of Lords, where the majority was five to three, it appears to me that the expressions of their Lordships, to some extent, sanction the proposition, that where there is neglect proved against the railway company, and contributory neglect proved against the plaintiff, the case must be submitted to the jury.

I have read the case over more than once, and I think it has not altered the general rule in such actions, although it applied a very stringent construction to it under the circumstances of that case.

The contributory negligence of the plaintiff may still be connected with the proved negligence of the defendant, and if upon the whole evidence, undisputed as to the facts, the plaintiff could by ordinary and reasonable care upon his part, according to all the circumstances of time, place, and other numerous and special details, have avoided or surmounted the effect of the defendant's neglect, the Judge may still decide there is (if he thinks so) no evidence of neglect of the defendant to be left to the jury, and determine the cause himself.

I think, notwithstanding the case of *Directors, &c., of Dublin, &c., R. W. Co. v. Slattery*, L. R. 3 App. 1155, that a man, in crossing a railway line where trains are frequently passing and repassing, would be chargeable with contributory negligence if he closed his eyes and walked on, and would not look out or provide against danger, because he was determined to trust solely to the company doing nothing or omitting nothing to apprise him of his danger, and that a Judge may still take the case into his own direction under such circumstances, although the case referred to is a marvellously near approach towards the justification of a man who will not use his senses being held blameless if he suffer injury from the carelessness of another, although that injury would not have happened but for his own refusal to use his senses.

Such a rule as that makes no distinction between the sane and the insane man, or between the rational and

irrational animal, that is, it declares our senses and faculties are given to us for offence only, and not for protection.

Now unlimited faith may or may not be given or yielded, or be allowable in some matters; but I think that the degree of faith which would induce a man to trust untold gold to another whom he knows to be dangerous, will not excuse him from responsibility merely because it was the duty of the other not to cheat him; and that a man who crosses and re-crosses railway tracks, and jumps upon or from trains in motion, without any kind of prudence or forethought, and who does so because he has such solid faith that no railway company will ever be guilty of negligence to put him in danger, is a man who should not be compensated if he is injured.

If the jury had found for the plaintiff, I think there should have been a new trial, if the defendants desired it

The rule will be discharged.

GALT and OSLER, JJ., concurred.

Rule discharged.

HUNTSMAN V. LYND.

*Ejectment—Lands included in patent—General and particular description—
Falsa demonstratio.*

Ejectment to recover a piece of land claimed by the plaintiff as part of the south half of lot 23 in the 10th concession of the township of Clinton, as being included in the patent thereof from the Crown, and by the defendant as ungranted land lying between the western boundary of the lot and the township line. No original field notes could be found, but according to the official plans lot 23 appeared to extend to the township line, and there was no evidence of any work on the ground inconsistent therewith; and it also appeared that the Government had never made any claim to this piece as ungranted land, but on the contrary had always assumed it to have been included in the patent of lot 23. In the patent there was a general description of the lot as lot 23 in the 10th concession, &c., and also a particular description by metes and bounds, which would exclude the part in question from the limits of lot 23.

Held, that the plaintiff was entitled to recover, for that the piece in question passed under the general description in the patent, and that the particular description which was inconsistent therewith must be rejected as *falsa demonstratio*.

THIS was an action of ejectment to recover possession of the south half of the south half of lot No. 23 in the 10th concession of the township of Clinton, described in the writ as follows: Commencing at the southeast angle of the lot: thence west along the southern boundary of the same to the line dividing the township of Clinton from the township of Grimsby, being to the western boundary of the said lot: thence north along the said line dividing said township, being along the western boundary of the said lot, 74 chains, more or less, to the centre of the concession: thence east, along the line dividing the north half from the south half of the lot, to the eastern boundary of the lot: thence south along the eastern boundary 25 chains, more or less, to the place of beginning.

The plaintiff claimed title by deed derived under Jonathan Mathews, the grantee of the Crown.

The defendant appeared and limited his defence to that portion of the land described as follows: Commencing at a point 20 chains from the southeast angle of lot 23, in the 10th concession: thence westerly, along the line

between the townships of Clinton and Gainsborough, to the township line of Grimsby: thence north, along the township line of Grimsby, 25 chains: thence easterly, parallel to the township line of Gainsborough, to a point 20 chains from the northeast angle of lot 23: thence south, parallel to the township line of Grimsby, 25 chains to the place of beginning.

The defendant claimed title: 1. By length of possession.
2. By right of occupancy.

The cause was tried before Patterson, J.A., without a jury, at St. Catharines, at the Spring Assizes of 1879.

The plaintiff proved a paper title to the south half of lot 23 under one Jonathan Mathews, who was the grantee of the Crown of lots 22 and 23 in the 10th concession.

An exemplification of the patent to Jonathan Mathews, dated 1st March, 1797, was put in, in which the land granted was thus described: A certain parcel or tract of land situate in the township of Clinton, containing by admeasurement two hundred acres, be the same more or less, being composed of lots 22 and 23 in the 10th concession, and situate, lying, and being in the township of Clinton aforesaid, in the county of Lincoln, and Home District, together with all woods, &c., under the reservations, &c., which said acres of land are butted and bounded or may be otherwise known as follows, that is to say: Beginning at the southwest angle of lot 21, in the 10th concession: thence west 41 chains: thence north 50 chains: thence east 41 chains: thence south 50 chains, to the place of beginning.

The township of Gainsborough lies south and the township of Grimsby west, of the township of Clinton.

The question in dispute was, whether the parcel of land defended for was a part of lot 23 or was a parcel of ungranted land lying between that lot and the east line of the township of Grimsby.

There was no doubt that lots 22 and 23, contained their full quantity as described in the patent, about 50 chains by 41 chains, including the one chain for the road between

lots 22 and 23, which would make 20 chains for each lot; but the actual distance from the road on the east side of lot 23 to the township line was 26 chains, and the contest was concerning these six chains.

There were no original field notes. Copies were produced of two old plans in the Crown Lands Department without date. The first being described as the plan of Clinton and having the entry in it: "Received this plan from the clerk of the council as having belonged to the Land Board of Lincoln. D. W. Smith, acting Surveyor-General. Witness, Thomas Ridout." This plan shewed eight concessions and the broken front without any courses or distances, and each concession contained 23 lots, not numbered.

The other plan was described as the township of Clinton, and shewed the 9th and 10th concessions without any courses or distances. The lots were numbered from 1 to 23, and were of a uniform width of 20 chains. Both plans indicated an allowance for road, of one chain, between every second lot, the last being between lots 22 and 23.

There was no evidence of any original posts or monuments or work on the ground, and the land in question had never been cleared or fenced.

The learned Judge found a verdict for the defendant holding that the patent gave an absolute width to the two lots. Leave was given to put in any further evidence from the Crown Lands Department.

In this term, May 20, 1879, *McClive* obtained a rule *nisi* to set aside the verdict for the defendant and enter it for the plaintiff, on the ground that the evidence at the trial, and the further documents, plans, and affidavits now produced, entitled the plaintiff to recover.

The additional evidence from the Crown Lands Department consisted of:—1. A copy of the description from which the patent for lots 22 and 23 was engrossed. It was as follows: "Jonathan Mathews, Clinton. Commencing at

the south-west angle of lot 21, 10th concession: thence west 41 chains, more or less: thence north 50 chains, *more or less*: thence east 41 chains, more or less: thence south 50 chains, more or less, to the place of beginning, containing about 200 acres, of which $28\frac{4}{7}$ acres are reserved as per general specification."

2. A letter or certificate of the assistant commissioner of the Crown Lands Department, stating that it appeared from the plans of the township of Clinton, and the description of lot 23 in the 10th concession, that there was no vacant land between that lot and the west boundary of the township.

3. Copy of the same plan of the 9th and 10th concessions, produced at the trial, but giving the names of the grantees of the lots which had been sold. On lots 22 and 23 the name of Jonathan Mathews appeared.

The township of Clinton was said to have been surveyed in 1787. There was nothing to shew when the township of Grimsby was surveyed.

An affidavit was made by the plaintiff's attorney, verifying a copy of a certain map or diagram of the township of Clinton taken from an old book of maps and plans of the townships of the county of Lincoln, now in the office of Messrs. Miller, Miller & Cox, in the city of St. Catharines, and which book the deponent was informed and believed was found in an old Government building in the town of Niagara. This plan was marked "Clinton, Surveyor-General's office, York, 2nd April, 1819. Thomas Ridout Surveyor-General." Scale 40 chains to an inch. Upon it there were shewn ten concessions and a broken front, and also a gore between the 8th and 9th concessions, extending across the township, with a width of seven chains on the west, and about one chain on the east side. This gore was not shewn upon any of the plans in the department.

An affidavit was made by one Isaac Teeter, a former owner of lot No. 23, as to acts of ownership up to the township line of Grimsby, and the absence of any claim by any one else to the surplus land.

Edward Gardiner, a provincial land surveyor, also deposed that he had surveyed lot 23 and could find no marks, blazes, or posts indicating that the western boundary of lot No. 23 was 20 chains west from the eastern boundary of the lot; but that he had discovered posts and other marks which led him to believe that the western boundary was a portion of the boundary line dividing the townships of Clinton and Grimsby: that none of the old residents ever heard of the western boundary being other than a portion of the said dividing line, and one of them pointed out a post which he alleged was on the boundary line of the townships on the south-west limit of lot 23 and the south-west limit of the township of Clinton.

During this term, May 31, 1879, *Bethune*, Q. C., shewed cause. The patent does not cover the *locus in quo*. The description in the patent must be presumed to have been taken from the field notes. The plaintiff or those under whom he claims had the full complement of land the patent called for, and the Court cannot assume that six chains more were given to lot 23 than to lot 22. Where the patent gives the absolute distances, and there is no evidence from the work on the ground that the lot contains a larger area than those distances would give, it cannot be assumed that the Crown intended to grant land lying between the lot so described and the limit of the township.

McClive, contra. The absence of anything on the plans to shew that there is any land between the west limit of lot 23 and the west limit of the township is strong to shew that the Crown intended that lot 23 was to include everything west of lot 22, and the west limit of the township. In short, that this lot is the last on the concession. It appears to be so in all the plans, and the particular description should not govern: *Gillen v. Haynes*, 33 U. C. R. 516; *Cartwright v. Detlor*, 19 U. C. R. 210; *Iler v. Nolan*, 21 U. C. R. 309; *Badgely v. Bender*, 3 O. S. 221.

June 27, 1879. OSLER, J.—Upon the evidence adduced at the trial, and that subsequently procured from the Crown

Lands Department, the plaintiff is, in my opinion, entitled to the *postea*. I treat the plan of 2nd April, 1819, as being properly before the Court. Its authenticity was not disputed, nor its reception objected to; but I reject the affidavits of Teeter and Gardiner. If they could be looked upon as important, and the plaintiff's case depended upon them, the utmost measure of relief which could be granted would be a new trial, which is not asked for; nor are these affidavits in fact such as, in accordance with the practice, the Court could act upon. For all that appears the persons who made them might have been examined at the trial, and no reason is given for not having called them.

In the case before us the lands are described in the patent with reference to lots and concessions, and by metes and bounds. The inference therefore is that there has been a survey, and, unless the contrary plainly appear, that the description has been prepared from such survey: *Martin v. Crow*, 22 U. C. R. 485; *Wigle v. Stewart*, 28 U. C. R. 427. The particular description is not inconsistent with the general description and the quantity of land granted. The particular description begins at an ascertained point, viz., the S. W. angle of lot No. 21, and the quantity of land called for by the patent has always been enjoyed by the patentee and those claiming under him.

In *Iler v. Nolan*, 21 U. C. R. 309, the Crown had granted to S., under whom the defendant claimed, "200 acres, more or less, in the township of Colchester, being lot No. 41, in front on Lake Erie, in the said township," describing it by metes and bounds, as: Commencing in front, on Lake Erie, at the south-east angle of the lot; thence north 175 chains; thence west 11 chains, 46 links, more or less, to the limits between 41 and 42; thence south 175 chains, more or less, to Lake Erie; thence easterly along the shore to the place of beginning. It was held that this grant included the whole of lot 41 in the 2nd concession, notwithstanding the particular description; and that nothing passed by a second patent for the rear part of the lot, commencing at

the distance of 175 chains from the south-east angle of the lot.

So in *Cartwright v. Detlor*, 19 U. C. R. 210, the lots as named were held to be governing words in the description, and an inconsistent description by metes and bounds was rejected.

The same rule was applied in *Gillen v. Haynes*, 33 U. C. R. 516. Here the defendant says that there is no repugnancy or inconsistency in the description, and that the rule invoked in the cases referred to has no application.

In *Iler v. Nolan*, Sir John Beverley Robinson, says, at p. 319: "It is a clear principle of law, which has always been acted upon in England and in our Courts here, that if a lot or close be granted by a certain name, and it can be clearly shewn what land the lot or close so named contains, the lot as named is the governing feature in the description, and it will pass by the grant according to its real contents, notwithstanding any erroneous description of it, which if literally carried out would either narrow or extend the quantity of land. As, for instance, if one grants lot A, and in describing it describes it improperly, lot A. will nevertheless pass according to its real boundaries and contents."

Now is the defendant's contention, above referred to, well founded. If we reject the particular description, we have the general description of the land as lot 23. This lot appears in the official plans to be bounded on the west by the western limit of the township, and there being no evidence of any work on the ground inconsistent with the plan, the latter would govern, and would shew clearly what the lot or close contained: *Stevens v. Buck*, 43 U. C. R. 1-6; *McGregor v. McMichael*, 41 U. C. R. 128.

We have then a lot or close granted by a certain name, the position and limits of which are defined upon official plans and in no other way outside of the patent. Then should not the particular description, in which the distances for width are given absolutely and which does not correspond with the plans, be rejected? It appears to me

that it should. It is proper also to be considered that from 1797 to the present time the Government have never asserted any claim to the land in question: that on the contrary they have always assumed that it passed under grant to Mathews.

As Sir John Beverley Robinson says, in *Gildersleeve v. Kennedy*, 5 U. C. R. 402: "If contemporaneous construction is a material point to be considered, the conduct of parties is no less material in throwing light upon their own understanding of their contracts." See also *Juson v. Reynolds*, 34 U. C. R. 174; *McEachern v. Somerville*, 37 U. C. R. 609.

In my opinion the plaintiff is entitled to recover as part of lot 23 all the land up to township line, and the particular description by metes and bounds contained in the patent, should be rejected as *falsa demonstratio*.

WILSON, C.J., and GALT, J., concurred.

Rule absolute.

PAGE V. AUSTIN.

Sci. fa.—*Company incorporated under 27-28 Vic. ch. 23—Transfer of stock as collateral security—Necessity for statement thereof in books of company and in transfer.*

In an action by way of *sci. fa.* by plaintiff, a judgment creditor of the Ontario Wood Pavement Company, incorporated under 27 & 28 Vic. ch. 23, against defendant as a shareholder thereof for unpaid stock, it appeared by oral evidence that the stock was transferred by one A. to defendant as collateral security for a debt due defendant by A., but the transfer was on its face absolute, and there was nothing in the books of the company to shew that A. had any interest in it.

Held, that the fact of the stock being transferred as collateral security should have appeared in the books of the company; and, *Sembla*, also in the transfer itself.

Held, therefore, that the defendant was liable, inasmuch as he was informed and knew that the shares were in fact unpaid, although they were entered in the company's books and in the certificate as fully paid up.

Scire facias by a judgment creditor of the Ontario Wood Pavement Company of Toronto, whose execution against the goods and chattels of the company had been returned *nulla bona*, against the defendant as a shareholder of the company, upon whose shares there was still unpaid \$8,880, or thereabouts, to compel payment by him of the amount of the said judgment, being \$1,997.91.

Pleas—1. That defendant was not a stockholder at the commencement of the suit.

2. That there was nothing due on the said shares.

3. That George Arthurs was the holder of 111 shares of the stock of the company, amounting to \$11,100, and was entered on the books of the company as the holder thereof, and in the said books the said shares were entered as fully paid up, and that he, the defendant, purchased the said shares from the said George Arthurs in good faith and for valuable consideration, believing the same to be fully paid up shares, and without any notice or knowledge that the same were not in fact so fully paid up, which are the same shares in the declaration mentioned.

4. That the writ of *fieri facias* was not returned by the sheriff *nulla bona*.

5. That the stock held by the defendant was and is so held by him as a trustee merely, and not otherwise, and other than such stock so held by him he never had, and has not now, any shares or stock in the said company.

6. That George Arthurs being indebted to the defendant in a large sum of money, and being the holder of the said shares, transferred the same to the defendant as collateral security merely for such indebtedness, and not otherwise, and the defendant accepted the said shares, and has always held and now holds the same as such collateral security merely, and not otherwise, and other than the said shares the defendant never had and has not now any shares or stock in the said company. Issue.

The cause was tried before Galt, J., without a jury, at Toronto, at the Summer Assizes of 1878.

The only material fact really in issue was, whether the defendant had notice or not at the time he took the transfer of shares from Arthurs, and got a certificate for the same in his name as holder thereof, that the shares were unpaid, excepting about \$1,000 which had been paid by Arthurs upon them, notwithstanding the entry in the company's books, and on the certificate issued to the defendant, that the shares were paid-up shares.

The only evidence material to be considered upon that question is that of Mr. Perkins, taken under commission for the plaintiff, and that of the defendant on his own behalf.

Mr. *Perkins* said : I requested Mr. Austin to become one of the directors of this company, and to invest money in this enterprise. I stated to him that only ten per cent. of the amount subscribed would be called for in cash, as that was all any of the subscribers were to pay : that the balance of subscriptions to stock would be considered paid by the conveyance of the patents to the company. Mr. Austin always declined to become a shareholder. He asked during these conversations how the stock was to be paid, and made all enquiries as to its condition, and I told him, and Mr. Arthurs told him, that with the exception of ten

per cent. in cash, the balance of it was to be paid by patents—the transfer of the patents to the company. Mr. Austin did not then become a shareholder. Mr. Austin afterwards came to me and told me Mr. Arthurs was owing him a considerable sum, I think \$10,000. I am not sure he stated the amount. He said Arthurs wanted him to take the stock as a payment or part payment of the debt. Mr. Austin asked me what I thought of the prospects of the company, and the value of the stock, and how Arthurs obtained it, and whether it was full paid-up stock. I said it was issued as full paid stock, and the certificates so stated that, and that the company had some valuable contracts, or were about getting them. Mr. Austin knew at that time whether the contracts had been obtained at that time or not. He was perfectly conversant with the operations of the company and its prospects. Mr. Austin said he considered the stock a good investment at fifty cents in the dollar, and he thought he should take the stock from Mr. Arthurs. When Mr. Arthurs made his last payment on account of the ten per cent. on the stock, he handed me a check for less than the amount that would have completed his payment, and he requested me to hand it to Mr. Austin for deposit in the Dominion Bank (of which Mr. Austin was president) to the credit of this company, and to ask Mr. Austin to deposit for him, Mr. Arthurs, the balance to make up the sum required to be paid. It was necessary the full amount should be paid that day in order to answer the requirements of the statute. Subsequently Mr. Austin, as president of the Dominion Bank, certified that the amount required by law to be deposited had been deposited within the time required.

Cross-examination—Do you mean to tell me that Mr. Austin was cognizant all the time of the organization of this company, how much the stock was, how much to be paid up, and how much to be patents, as the matter was going on? Yes; every particle of it from beginning to end. He knew just as well as I did; at every step he knew the whole business from beginning to end. You are

quite positive that you explained to Mr. Austin, at that interview, the proportion of cash and of patents which paid up the capital stock ? Yes, I did. And you told him about the contracts ? Yes. So that he got the whole story from you ? Yes. How was it that he came to ask you about these matters, when he knew just as much about them as you did ? I cannot say, except that I was intimately acquainted with him, and we were in the habit of conversing about the company and its affairs whenever we met. Did you at that time regard it good stock ? I did. The stock was fully paid up, ninety per cent. patents, and ten per cent. in cash. Did you consider that a fair and proper valuation of the patents ? No, I did not. I thought they were worth more.

The defendant was called as witness. He said : I had no faith in the company from the beginning. I knew nothing about the affairs of the company any more than by talking with Mr. Arthurs from time to time. I told him I had not any faith in it. I did not know whether his stock was paid up or not. Perkins and Arthurs told me there was nothing but paid-up stock ; that it was all paid up. I knew nothing of the details of his stock. I had no occasion to enquire about it until the time of my taking the security. I held the stock in security, the same as I took it.

Q. Mr. Perkins, in his answer says, that he told you all about the details of the company's affairs. Is that correct ?

Ans. I do not think he ever told me anything about it. I had no reason to ask him ; he may have talked over a lot of things that I took no interest in. I do not know ; I have no recollection of it. He told me the stock was paid up. Whether he had reference to the directors' stock or the shareholders' stock, I do not know. That was just before I took the stock. No one ever told me before I took the stock it was not fully paid up. I never heard that. If I had been told I would have been a little more particular in having it marked on the thing itself.

Cross-examination : It is not true I arranged that

Arthurs should get the ten per cent. he had paid in from the Dominion Bank.

Q. Can you swear positively it is not true? Ans. No. I cannot, without searching my bank books. I will not swear I did not, but I believe I never did. I took the stock as paid up and only as security, else I would not have touched it at all. I did not think there was any liability on my part. I did not think that Arthurs had put in the \$10,000. I thought the probability was that he had some arrangement with them. I did not know what the arrangement was, probably that he should be paid something for his services. I had heard that. I thought he had paid some cash on it, but I did not know what he had paid. I did not think he had paid the whole \$10,000 or \$11,000. I did not know anything about it, and therefore I have no right to think. He might or he might not. I do not think that it was that which made me enquire from Perkins. I spoke to Mr. Hime [then the treasurer of the company] about it, and he told me it was paid-up stock. I think I asked if it was paid-up. Perkins said it was all paid-up stock. I do not remember what expressions he used. I knew he led me to believe it was paid-up stock. He intended to convey that idea to me, because I told him I intended to take the stock as security. I thought it was worth probably thirty-seven cents in the dollar. I relied upon what Perkins said and upon the certificate—more particularly upon the certificate. There was no instrument in writing shewing the arrangement between Arthurs and myself.

Witnesses were called by the defendant to discredit Perkins's character, but it was not very much affected.

The learned Judge found as follows:—

"I find that by the books of the company the stock appeared to be paid up; but that there was only ten per cent. in money paid on the stock.

"I find the transfer was made to Mr. Austin as security for the amount of Mr. Arthurs's note to him.

"I find defendant never intended to incur any responsi-

bility with regard to any unpaid balance that might be due upon the stock. This finding, and the one before it, are subject to the objection taken by Mr. Bethune, that parol evidence is not admissible to prove that Mr. Austin held it merely as security.

"Therefore I find a verdict for the defendant. But the plaintiff of course can move to enter a verdict for the amount, \$1,603, and interest from July, 1874, if the Court should be of opinion that under the evidence given Mr. Austin is liable."

In Trinity term, August 27, 1878, *Falconbridge* obtained a rule calling on the defendant to shew cause why the verdict should not be set aside, and a verdict entered for the plaintiff, and damages at \$1,603, with interest from July, 1874, upon the ground that the verdict is contrary to law and evidence; or why a new trial should not be granted on account of the improper admission of evidence as to an alleged arrangement among the original shareholders as to the stock in question, and as to the terms on which the defendant accepted the stock.

In Hilary term, February 11, 1879, *Maclennan*, Q. C., shewed cause. The 27 & 28 Vic. ch. 23, sec. 5, sub-secs. 27-29 shew that persons holding such stock as security are not to be liable upon or in respect of it, and the defendant, who held it as collateral security, is not liable. Sub-sec. 25 shews also that the company is not bound to see or to take notice of any trust, which is also in favour of the defendant. Sub-sec. 30 is also important, because by it the real owner of the stock is the person to vote upon it. But if the defendant is not protected by these sections, he is not nevertheless liable, because it was proved he took the stock as paid-up stock, and, if it were not in fact paid up, he had no notice of that fact: *McIntyre v. McCracken*, 1 Sup. C. 479. It was contended by the plaintiff's counsel at the trial that the fact that the defendant held the stock from Arthurs only in security for his debt was not proved by any

writing; but no writing is necessary to prove a declaration of trust of this nature.

Bethune, Q. C., and *Osler* supported the rule. It is admitted by the plaintiff that notice must be shewn to have been given to the defendant that this stock, which Arthurs held as paid-up stock, and which the defendant took from him as paid-up, and which the company by the entries in their books have entered as paid-up, was not in fact paid-up, according to the case cited for the defendant. But it should be considered that when the defendant speaks of matters which took place between him and Arthurs, who is dead, it should be received with great caution. The defendant says he took this stock only in security. But the evidence in writing as to the transaction shews it was taken absolutely. The certificate now held by the defendant is absolute. He holds also an absolute deed of real property, given to him at the same time by Arthurs for the same debt for which these shares were assigned, and there is no writing of any kind shewing the arrangement to have been one of security only, or otherwise than an absolute transfer. The statute requires that the taking of stock and the transfer of it shall be in writing, and if the stock is taken only as security, that fact should appear in the deed of transfer, or in some other writing. The company cannot know whether the shareholder is an executor, or holds the stock as collateral security, or as pledgee, &c., unless such matters appear in their books. The pledgor, it is declared by sub-sec. 30, may vote as a shareholder, but he cannot do that unless the books shew the person who holds his stock is only the pledgee. As to the fact of notice to the defendant that the stock was not paid, the certificate given to the defendant does not shew it to have been paid. Perkins states positively he told the defendant expressly the stock was not paid up, and how it was that it was said to be paid up by the books; and he says also that the defendant knew all about Arthurs's stock and the affairs of the company generally as well as Perkins did. The defendant also said in his evidence he did not believe Arthurs had

paid up his stock, but he thought in some way it was paid up by his services for the company, or by some arrangement with the company: *Burkinshaw v. Nicolls*, L R. 3 App. Ca. 1004.

June 27, 1879. WILSON, C. J.—The questions for decision are :

Firstly.—Did the defendant take the shares from Arthurs as collateral security for the debt which Arthurs owed to him, and continue to hold them as such until the commencement of this action.

Secondly.—If he did. Should the fact that he was not the absolute owner of the stock have appeared in the transfer of such stock to him or in the books of the company ?

Thirdly.—If it should, then, inasmuch as it did not so appear, had the defendant notice of these shares being in fact unpaid.

I think, upon the evidence, it should be held that the stock was as a fact taken as collateral security by the defendant. The defendant says so positively, and Mr. Leys, who was acting for Arthurs professionally, says so too.

I do not say there is not evidence to some extent opposed to that view. The transfer of the stock is absolute. So also is the conveyance by Arthurs to the defendant of the real property, and if the defendant was taking the stock as collateral security, it was of no consequence to him whether the stock was paid in full or not, so far as his legal liability upon it was concerned, yet his evidence shews that all his enquiries were directed to his discovery of whether the stock was paid up or not. That, however, may have been to ascertain whether it was worth taking or not; and he might not have known that the statute protected him if he was only the holder of it in security. Upon the whole I think the first question should be answered in his favour.

As to the second question, the answer to it must depend upon the statute.

As a mere matter of trust no writing was required to prove the trust, so far as the shares are concerned, and the common law would not require a writing of any kind concerning them.

I shall now recite the main parts of the sections of the Act, 27-28 Vic. ch. 23. There is no doubt the shareholders must subscribe for their stock, and that all transfers of stock must be duly entered in the books of the company.

The transfers must be in writing, because they are to be presented to the company for entry, and they are required to contain the date, *and other particulars of the transfer*, and to be entered in a book.

The name, address, and calling of each shareholder must be entered in a book.

The shareholder *in whose name the shares stand*, is the only one who can give a valid discharge to the company.

The director must be a shareholder, *owning stock absolutely in his own right*. Executors, &c., holding stock as such, are not personally liable on the shares.

Nor persons holding stocks as collateral security. But the pledgor of stock shall be personally liable, and shall represent the stock and vote upon it. Executors, &c., shall represent the stock at meetings, and may vote accordingly as shareholders.

How can it be known in voting for a director whether the director "owns the stock absolutely in his own right," unless the way in which he does own it is entered in the books of the company?

How can it be known that the executor or other representative person, or the holder of collateral security, is such a person, and shall not be personally liable, unless a proper entry to that effect is made in the books?

And how can it be known that the person who is pledgee only of the stock is not the proper person to represent it, and to vote upon it, unless the fact of the pledge is stated in the books, and that the transferee of it is only a pledgee?

These are all difficulties in the way if a general transfer may be used in such cases, and the special facts are to be

left to be proved by collateral testimony of any kind, but especially by collateral verbal testimony which is so liable to be disputed.

Now the statute says that all transfers of stock, "and the date and other particulars of each transfer," shall be made in a book.

That points to the kind of information being given, which has been alluded to ; and it is manifest that if it be not given the affairs of the company cannot be properly carried on.

But besides that, the creditors of the company are entitled to know who the shareholders are ; and it is a most important matter for them to know on examining the books of the company whether the shareholders are *personally* liable, or the estates or persons only which they represent. It is too late to tell them that, after an action has been commenced against a person appearing to be the absolute shareholder.

If the creditor cannot get full and correct information from the books of the company, which are *prima facie* evidence of all facts stated in them as against the company and the shareholders, the keeping of such books by companies is of little use, and the whole machinery for the protection of the creditor against the shareholders is a delusion.

I can form no other opinion than that the statute of necessity requires that the character in which the shareholder has the shares shall be specified in the books of the company, and, as I think, on the transfer also ; and if the books do not, or the transfer does not, contain the statement, that the person in whose name the shares stand holds them otherwise than as a general and ordinary shareholder, he must be taken, so far, at any rate, as creditors of the company are concerned, to be the absolute and general owner of the shares, and to be personally liable in respect of them.

I determine the second question against the defendant.

The remaining question is, whether the defendant had actual notice at the time of the transfer to him that the shares he took as paid up were not in fact paid, as the books represented.

And that question, I think, must be answered also adversely to the defendant.

The evidence of Mr. Perkins, taken under the commission, plainly establishes it.

The defendant knew Arthurs was not very well supplied with money at that time. He owed the defendant about \$11,000, for which he had to give security. The defendant in his examination said: "I did not think that he had put the \$10,000 or \$11,000 into that concern (the company) in money to pay up the stock. I thought the probability was, that he had some arrangement between them. I did not know what that arrangement was. Probably that he should be paid something for his services. I have heard that. I thought he had paid some cash on it, but I did not know what he had paid. I did not think he had paid the whole \$10,000 or \$11,000. I did not know anything about it, and therefore I had no right to think." Here it is expressly stated that the defendant did not think Arthurs had paid up the whole stock in cash, but he thought Arthurs had paid some cash on it; and he thought *probably* the rest of it was paid by services Arthurs had rendered the company. What these services were or could be to cover so very large a sum as that between \$10,000 and \$11,000 and *some cash* paid on it, which does not sound like a very heavy payment, was not explained in any way, and probably could not have been. I have no idea that any such services were rendered, and that they could have been believed in by any one.

I have no doubt upon the evidence, and that is, of course, all I can judge by, that the defendant did know he was taking from Arthurs unpaid shares, and that he is liable as the holder of such shares to the plaintiff, a judgment creditor of the company.

The case of *Burkinshaw v. Nicolls*, L. R. 3 App. Ca. 1004, cited on the argument, is very applicable on the point of notice to this case.

The rule should be absolute to enter the verdict for the plaintiff, with damages \$1,603, and interest thereon from July, 1874.

GALT, J.—The facts of this case are so clearly stated by the Chief Justice in his judgment that it is unnecessary for me to refer to them. I entered a verdict for the defendant at the trial, on the ground that the transfer was made to him as security for the amount of Mr. Arthur's debt to him, and because he never intended to incur any responsibility with regard to any unpaid balance that might be due upon the stock.

The transfer of the stock in question was absolute on its face, and there was nothing in the books of the company to shew that Mr. Arthurs retained any interest in it. He had, as far as the books of the company were concerned, ceased to be a shareholder, and the stock stood in the name of the defendant.

The company are, by the 19th section of the Act under which they are incorporated, required to keep a book in which shall be recorded the names of all persons who are or have been shareholders.

By the 22nd sub-sec. of sec. 5, such books shall be open for the inspection of shareholders and creditors.

By sub-sec. 27, each shareholder shall be liable to the creditors of the company, until the whole amount of his stock has been paid up to an amount equal to that not paid up thereon.

By sub-sec. 29, "No person holding stock in the company as an executor, administrator, tutor, curator, guardian, or trustee, shall be personally subject to liability as a shareholder, but the estates and funds in the hands of such person, shall be liable in like manner and to the same extent as the testator or intestate, or the minor, ward or interdicted person, or the person interested in such trust fund, would be, if living and competent to act, and holding such stock in his own name ; and no person holding such stock as collateral security, shall be personally [subject to such liability, but the person pledging such stock shall be considered as holding the same, and shall be liable as a shareholder accordingly."

By sub-sec. 30, "Every such executor," &c., "or trustee,

shall represent the stock in his hands, at all meetings of the company, and may vote accordingly as a shareholder; and every person who pledges his stock may nevertheless represent the same at all such meetings, and may vote accordingly as a shareholder."

From the foregoing provisions it is manifest that a distinction is made between a trustee, that is to say, a person holding stock as a trustee, and a person to whom stock or shares have been pledged. In the former case the trustee represents the stock at all meetings of the shareholders, while in the latter the person pledging the stock has that right, not the person to whom it is pledged. It is clear then that the stock must still stand in the books as the stock of the pledgor, and not of the creditor; for unless he appeared to be still a shareholder he could have no such right.

If a person receiving stock as a pledge does so by accepting an absolute transfer, it appears to me he must be looked upon in all matters affecting the company as the owner of the stock. He is in one sense a trustee, but not in the sense used in the statute. The trustee mentioned in the statute is in reality the absolute owner of the stock, although he may hold it for the benefit of another person; whereas the person to whom shares have been pledged is only a trustee in this, that he holds them simply as a security for a debt or other demand.

The only way in which it appears to me a person can accept a pledge of the stock so as to relieve himself from liability as a shareholder, and to enable the debtor to exercise his right as a shareholder, is to have the transfer entered in the books as an assignment as security only, in which case the person making the pledge would still appear as the owner; and any creditor availing himself of the provisions of the 22nd sub-section would know that he had no claim against the pledgee.

In the case before us the defendant accepted an absolute transfer; and I am of opinion took upon himself the responsibility of a shareholder.

The rule will therefore be absolute.

OSLER, J., took no part in the judgment, having been engaged in the case while at the bar.

Rule absolute..

EVANS V. ROSS.

Insolvency—Sale of goods within thirty days of insolvency—Statutory presumption of being made in contemplation of insolvency—Sec. 133 of Act of 1875—Whether accommodation acceptor a creditor.

Where a sale or transfer of goods is made to a creditor within thirty days before the issuing of a writ of attachment in insolvency: *Held*, that the statutory presumption raised by sec. 133 of the Act of 1875, that it is done in contemplation of insolvency, is not displaced by merely shewing that the sale or transfer was *bona fide*, or that the creditor did not know or had not probable cause for believing the insolvent was unable to meet his engagements.

In this case the goods were delivered to the defendant, an accommodation acceptor of a draft, drawn on him by insolvents, and protested for non-payment, upon the defendant agreeing to take up the draft, which he did. The only evidence as to the condition of the insolvents' affairs was, that within three days after the delivery of the goods, the insolvents made an assignment in pursuance of the Act, their liabilities being upwards of \$147,000.

Held, under these circumstances the sale must be deemed to have been made in contemplation of insolvency, and there being no evidence displacing such presumption, the defendant, if a creditor, must be assumed to have obtained an unjust preference, notwithstanding the jury expressly found otherwise.

Held, however, that an accommodation acceptor who has not paid the note is not a creditor within the meaning of the 133rd section of the Act, so as to avoid a sale made in good faith and in the ordinary course of business.

THIS was an action brought by the plaintiff as assignee in insolvency of W. S. Wood & Co., insolvents, to recover property alleged to have been sold or transferred and money paid by the insolvents, contrary to the 133rd and 134th sections of the Insolvent Act of 1875.

The declaration contained three counts.

The first count alleged that the insolvents within thirty days before the issue of the writ of attachment, being indebted to the defendant, did in contemplation of insolvency give and transfer to the defendant certain goods by way of payment, whereby the defendant obtained an unjust preference.

The second count was similar, but alleged that the goods were transferred by way of security for payment.

The third alleged that the goods were within thirty days from the issue of the writ of attachment, delivered by way of payment of a debt due from the insolvents to the defendant, the former being then unable to meet their engagements in full, and the latter knowing such inability or having probable cause for believing it to exist.

Pleas :

1. Not guilty.
2. That the sale was not made in contemplation of insolvency.
3. That the defendant did not know, and had not probably cause for believing, that the insolvents were unable to meet their engagements.

Issue.

The cause was tried before Armour, J., and a jury, at Cornwall, at the Spring Assizes of 1879.

The defendant was a retail dry goods merchant at Port Hope. The insolvents were wholesale dry goods merchants at Montreal. The defendant accepted, for the accommodation of the insolvents, their draft for \$810 at 30 days, due 18th November, 1877, at Port Hope. The draft in question was protested on the 19th November, and the defendant received notice of dishonour on the 20th. On that day he went to Montreal, and on the following day he purchased from the insolvents the goods, the subject of this action.

The defendant said: "I purchased goods from Wood & Co., one parcel of \$853 and another of \$417. The first parcel was on six months, the other on nine months' credit."

I was to pay them for the six months' goods by giving them my note at six months, which they were to discount and take up their draft, or they were to allow me a discount of 8 per cent., and I was to take up the draft. I paid the draft and took the discount. I was neither debtor nor creditor of Wood & Co. when I bought the parcels. I bought them in the ordinary course of business. When I bought I did not know anything of the standing of Wood & Co. I had never been told by them or others that they were in difficulties, and I considered them perfectly good."

In cross-examination he said: "I bought goods elsewhere when I was in Montreal, at McKenzie's and at Fraser's. I met Davis" (one of the insolvents) "on the street. He asked me to go to the office with him. He said he had some tweeds. I told him I would see them. I asked him why the draft had not been paid. He said he was hard up : that there were some notes between them and Fraser, and Fraser had not paid up. * * I was not frightened about the draft ; I had no anxiety—no anticipation that it would not be paid.

On the 23rd November Wood & Co., made an assignment pursuant to the Act, to the plaintiff, an official assignee. Their liabilities appeared to be upwards of \$147,000. It did not appear what their assets were. The assignee had never treated the defendant as a creditor of the estate in respect of the draft which he had taken up. The defendant never received notice as a creditor, or proved a claim on the estate.

There was no other evidence.

The jury were asked to answer the following questions :

1. Was the purchase made by Ross in good faith in the ordinary course of business, or was the purchase made merely for the purpose of getting his acceptance paid ?
Ans. In good faith.

2. Did Ross know, or had he probable cause for believing, that W. S. Wood & Co., were, at the time he made the purchase, unable to meet their engagements ? Ans. He had no just cause to know.

3. Did the defendant, by his purchase, obtain any unjust preference over the other creditors of the insolvents?

Ans. He did not.

The learned Judge, acting upon these answers, upon the view that the defendant was not a creditor of the insolvents, entered a verdict for the defendant.

There were no objections to the learned Judge's charge, or to the questions put to the jury.

In this term, May 21, 1879, *Robinson*, Q. C., obtained a rule *nisi* to set aside the verdict, and for a new trial on the ground that the verdict was against law and evidence, and that the answers given by the jury were not warranted by the evidence, and were against evidence and the weight of evidence, and that the third question was improperly submitted, not being a question of fact proper to be determined by a jury; and a verdict should not be entered for \$853 and interest, on the ground that upon the law and evidence the plaintiff was entitled to recover, and that the jury should have been so directed: that upon the answers of the jury the verdict should have been so entered, and that upon the evidence the defendant was shewn to be a creditor of the insolvents, and to have obtained an unjust preference over the other creditors of the insolvents, and the transaction impeached was avoided by the Insolvent Act.

During the same term, June 5, 1879, *Bethune*, Q. C., shewed cause.

Robinson, Q. C., contra.

The arguments sufficiently appear from the judgment. The following cases were referred to: *Ex parte Blackburn*, *In re Cheeseboro*, L. R. 12 Eq. 358, 363; *McEdwards v. Palmer*, 2 App. 439; *Smith v. Hutchinson*, 2 App. 405; *Smith v. McLean*, 25 Grant 567; *Nelles v. Paul*, in appeal from Court of Chancery, noted in 15 C. L. J. N. S. 79, not yet reported; *City Bank v. Smith*, 20 C. P. 93; *Suter v. Merchants' Bank*, 24 Grant 365; *Campbell v. Barrie*, 31 U. C. R. 279; *Ex parte Butcher*, *In re Meldrum*, L. R. 9 Ch. 595, 598.

June 27, 1879. OSLER, J.—No objection having been made at the trial to the charge of the learned Judge, nor to the questions which he submitted to the jury, it is not now open to the plaintiff to take any exceptions to the verdict, either for misdirection or non-direction, as to the questions submitted. We can only consider whether upon the answers to these questions, and upon the law and evidence, the plaintiff is entitled to a verdict.

The first and second counts are framed upon the 133rd section of the Act; while the third count is on the 134th section.

This latter count appears to be very inaptly framed, for the 134th section deals with the payment of money only, not the sale, transfer, or delivery of goods; and the same circumstances do not avoid both transactions.

Assuming, however, that a good cause of action is disclosed in this count, the answer of the jury to the second question disposes of it adversely to the plaintiff, for it shews that one of the ingredients which must co-exist in order to render a payment void under this section is wanting.

It remains to be considered whether the first and second counts have been proved.

The first and second questions and the answers thereto, are appropriate to the third count only, (though, as I shall hereafter point out, they shew that the plaintiff cannot establish a claim under the 130th section,) for, as the transfer impeached took place within thirty days before the issue of the writ of attachment, the statutory presumption that it was made in contemplation of insolvency applies, and the defendant does not remove that presumption merely by shewing that the sale or transfer was *bona fide*, or that he did not know or had not probable cause for believing that the insolvents were unable to meet their engagements. The onus of proving clearly that the insolvents did not act in contemplation of insolvency is cast upon the defendant. If the evidence he adduces does no more than leave the matter in doubt, he must fail. If the case proved is consistent with the

unjust preference being given in contemplation of insolvency, the complainant must succeed: *Davidson v. Ross*, 24 Grant 22, 80; *Smith v. McLean*, 25 Grant 567. Nor is the defendant's case helped by the answer to the third question, that he did not obtain an unjust preference. If he has not removed the *prima facie* presumption that the transfer was made in contemplation of insolvency, the necessary result is that he did obtain an unjust preference, unless he has shewn that the preference was one permitted by the Act.

So far as this question can be said to be a question of fact, the answer is entirely against evidence.

It was hardly contended that the *prima facie* presumption referred to was displaced. It lay upon the defendant to shew that the insolvents did not know, or that there was no reason for them to know, that the condition of their affairs was such that they would probably, though not certainly, become insolvents under the Act. There is absolutely no evidence in support of this view. On the contrary, the evidence is all in support of the presumption. The insolvents ceased to meet their liabilities, and three days after the sale of these goods to the defendant, they failed for nearly \$150,000. This in substance was the only evidence as to the condition of their affairs. It is, therefore, sufficiently clear that the sale was, in point of law, made in contemplation of insolvency, and that the defendant, if he was a creditor, obtained an unjust preference.

The defendant, however, contends that he was not a creditor of the insolvents; and that the sale having been made in good faith, the fact that it had the effect of relieving him from his liability upon his acceptance, does not avoid it.

The Insolvent Act, section two, (h) defines "a creditor" as "every person, co-partnership or company to whom the insolvent is *liable*, whether primarily or secondarily, and whether as principal or surety." The primary and secondary liability referred to is that of the insolvent, *e. g.*, as maker or endorser of a note, not of the creditor: *Roe v. Smith*, 15 Grant 344.

Section 80 declares that "All debts due and payable by the insolvent at the time of the * * issue of the writ of attachment under this Act, and all debts due but not then actually payable * * shall have the right to rank upon the estate of the insolvent ; and any person then being, as surety or otherwise, liable for any debt of the insolvent, and who subsequently pays such debt, shall thereafter stand in the place of the original creditor, if such creditor has proved his claim on such debt; or if he has not proved such person shall be entitled to prove against and rank upon the estate for such debt to the same extent and with the same effect as the creditor might have done."

The 133rd section provides that, if any sale * * * be made of any property real or personal by any person in contemplation of insolvency, by way of security for payment to any creditor; or if any property * * * be given by way of payment by such person, to any creditor, whereby such creditor obtains, or will obtain an unjust preference over the other creditors, such sale," &c., "shall be null and void."

In *Roe v. Smith*, 15 Grant 344, decided upon the corresponding section of the Act of 1864, the defendant being surety for the insolvent as endorser upon a promissory note not yet due, followed him to the United States, and there compelled him to pay over the amount of the note. The defendant contended that he was not a creditor. The case was decided upon another ground, but the Chancellor, in commenting upon this contention, pointed out that in the old Insolvency Act, Consol. Stat. U. C. ch. 18, sec. 57, the debtor on the eve of insolvency was prohibited from making a voluntary payment to a creditor or surety for him; while in the Act of 1864, it was the creditor only and not the surety who was inhibited from receiving payment or security for a debt. The surety, he says, is not a creditor till he pays the money.

In *Churchier v. Cousins*, 28 U. C. R. 540, the defendant was endorser of a promissory note made by the insolvents. Two days before the assignment the insolvents sold to

one Campbell, a quantity of lumber, and took his note for the price. This note the defendant and one of the insolvents took to the bank and left it there with instructions to apply it in payment of the note endorsed by the defendant. It was held that there was evidence that the delivery of this note was a sale or transfer to the defendant as a creditor by way of payment by the insolvents, whereby he obtained an unjust preference over the other creditors, and that the sale was therefore void. The case of *Roe v. Smith*, 15 Grant 344, was not referred to; and *Crosby v. Crouch*, 11 East 256; *Van Casteel v. Booker*, 2 Ex. 691, and *Bishop v. Crawshay*, 3 B. & C. 417, were cited in support of the view that the defendant was a creditor. But an examination of these cases will shew that they do not afford much assistance in ascertaining the meaning which is to be placed upon the word *creditor* as used in the 133rd section of the Act, as they deal, not so much with the question whether the transactions there in question were had with creditors, as whether they could be entered into with creditors whose debts were not yet due: *Thompson v. Freeman*, 1 T. R. 155; *Hartshorn v. Sladden*, 2 B. & P. 582.

It will be observed as to the case of *Churcher v. Cousins*, that it was not necessary to decide that the defendant was a creditor within the meaning of the Act, as the transaction was held to be equally avoided under sec. 8, sub-sec. 1, of the Act, sec. 130 of 1875.

In *Botham v. Armstrong*, 24 Grant 216, a brief note of the ruling of Mowat, V.C., in a case of *Churcher v. Stanley*, heard before him on circuit, is given. It may be inferred that the defendant was an endorser on the note of one Hodgins, which was held by a bank: that Hodgins being at the time insolvent transferred three new notes to the bank, which the defendant induced the bank, by endorsing them after Hodgins, to accept instead of the existing note. The suit was to recover the amount of the three notes from the defendant.

The Vice Chancellor says, at p. 218, "I think on the

whole evidence, that I should infer the existence of an antecedent agreement or understanding between the insolvent and the defendant, that the three notes should be applied so as to give the defendant a preference over other creditors. In short, I think that the facts warrant the inference that there was a sale or transfer of the notes, either by way of payment, or as security for payment, within the meaning of the 89th section. Decree for plaintiff for the amount of the three notes."

It appears from the report, to have been assumed that the defendant was a creditor of the insolvent; and the learned Vice Chancellor did not consider that the transaction had been entered into in good faith.

In *Preston v. Hunton*, 37 U. C. R. 177, the plaintiff sued for money paid upon certain notes which he had made for the accommodation of the defendant. The defendants pleaded their discharge under the Insolvent Act, and the question was, whether the plaintiff could be said to have been scheduled as a creditor when the banks, the holders of the notes, were named as the creditors, and proved the debts upon the notes, which were described in the statement as having been made by the plaintiff for the accommodation of the defendants. It appeared that at the time of the assignment the banks were not in fact the creditors, having been paid by the plaintiff shortly before; but this fact was unknown to the insolvents, and the plaintiff had purposely kept them ignorant of it.

Wilson, J., observes, at p. 198: "Is the statement that the notes were made by the plaintiff for the accommodation of the insolvent a statement of his name as a creditor? It does thereby appear that he was a creditor as a surety, and if he had in fact been only that at the time, he would be entitled, when he paid the debt, to stand in the place of the creditor: sec. 56. But he was in fact then the real and actual creditor. I am of opinion that as the *two notes* have been duly set forth in the statement of liabilities presented at the first meeting of creditors, and as it is shewn in that statement that the plaintiff was an

accommodation party only for the insolvents, that the insolvents did shew that they were indebted to the banks whose names were inserted as the holders of the notes, and that they were also indebted to the plaintiff as their surety, upon the notes. As the banks were not then in fact the creditors, * * and as the plaintiff was the creditor, I am disposed to think, according to the authorities, that the statement presented at the first meeting of creditors did sufficiently describe the plaintiff as a creditor."

In *Cockburn v. Sylvester*, 1 App. 471, the plaintiff had accepted a draft for the accommodation of one C., who at the same time endorsed to him as security for the acceptance a warehouse receipt given by the defendant. It was held that there was no debt contracted from C. to the plaintiff at the time of the endorsement of the receipt.

Burton, J. A., says, at p. 476: "I do not agree * * that it was a claim which might have been proved under the Insolvent Act: it was not a debt coming within the definition of *debitum in presenti solvendum in futuro*, nor a debt upon a contingency; it was not a debt at all, though it was quite possible, as the result shews, that a debt might arise from the plaintiff's granting the acceptance, and being afterwards compelled to pay it."

See also, *Abbott v. Hicks*, 7 Scott 715.

Now if the accommodation acceptor or surety is unable to rank upon or prove against the insolvent's estate before he has actually paid the debt, I am unable to see how he can properly be described as a creditor. He may, as provided by the 80th section, on paying the debt for which he is surety, obtain the benefit of the original creditor's proof, or, if the latter has not proved, he may himself prove against and rank upon the estate to the same extent as the creditor might have done. But in this section the respective positions of creditor and surety are kept distinct, and, in my opinion, there is nothing in the 2nd or 133rd sections which requires us to give any extended meaning to the former word as used in those sections.

It appears to me to be used in the sense of a person

having a claim which can be proved in insolvency, as is said in *Wood v. DeMattos*, L. R. 1 Ex. 91.

If the transaction between the debtor and the surety is not entered into in good faith, as was the case in *Churcher v. Cousins*, 28 U. C. R. 540, and *Churcher v. Stanley*, 24 Grant 218 note, it will be avoided under the 130th or 132nd sections of the Act, but where it is accompanied with good faith and is in the ordinary course of business, I see no reason for endeavouring to bring it within the 133rd section by what I cannot but feel would be a forced construction of the word "creditor."

I have examined several of the cases in the American Courts, but they do not throw much light on the subject, as the language of the United States Bankrupt Act is very different from ours, and embraces almost in terms the case in question. See *Ahl v. Thorner*, 3 B. R. 118; *Bean v. Laflin*, 5 B. R. 333.

In *Nelles v. Paul*, in appeal from the Court of Chancery, noted in 15 C. L. J. N. S. 79, not yet reported, it was held that a payment made by a debtor at the request of the surety in discharge of the latter's obligation could not be avoided under the 134th section, or be recovered from either the creditor or surety, if made in good faith.

See also *Smith v. McLean*, 25 Grant 567; *Smith v. Hutchinson*, 2 App. 405.

In my opinion the rule should be discharged.

WILSON, C. J., and GALT, J., concurred.

Rule discharged.

THE BOARD OF EDUCATION OF THE TOWN OF PARIS V.
THE CITIZENS' INSURANCE AND INVESTMENT COMPANY.

Action on guarantee policy—Default of town treasurer—Amount of default—Appropriation of payments—County auditors—Audit—R. S. O. ch. 204, sec. 87, sub-sec. 7, ch. 205, sec. 3—Authority for paying out money.

Action on a guarantee policy for loss sustained by the plaintiffs through the default of one D., their secretary-treasurer.

The plaintiffs made, on 1st January, 1879, their claim under the policy, which only extended to losses occurring within the period of twelve months prior to such claim being made. It appeared that at the end of 1877, the default was \$674, which was increased during the first two months of 1878, to \$1261.57, but in the next four months the deficiency was reduced by payments to \$292.85, after which it again increased until, at the end of 1878, it amounted to \$844.22.

Held, in accordance with the general rule as to appropriation of payments, that, in the absence of any specific appropriation, the payments must be appropriated to the earliest items of the default, thereby paying off the whole of the default due at the end of 1877, so that the whole amount of \$844.22, due at the end of 1878, must be deemed to have accrued due within that year; and that the plaintiff was entitled, if at all, to recover this amount.

The guarantee proposal herein contained certain statements which were made to form part of the contract, one of which was that D.'s books would be balanced and closed at the end of each year, and that the cash and securities at plaintiffs' credit at each balancing time would be examined and verified by the auditors as required by the statute.

Held, under R. S. O. ch. 204, sec. 87, sub-sec. 7, and R. S. O. ch. 205 sec. 3, Paris, not being an incorporated town withdrawn from the county, the audit should have been made by the county auditors, and not, as here, by the town auditors; and also that the evidence, set out below, shewed that there was no audit in fact; and that therefore the terms of the guarantee had not been complied with.

Another statement contained in the guarantee proposal was that all moneys would be drawn out from the bank where they were deposited only by authority of the Board of Education. The course pursued was for the chairman and D., the secretary, to sign orders addressed to D., as such secretary, directing him to pay bearer so much money, and specifying the service for which it was payable. D. then drew his own cheques for the amounts without their being countersigned by any of the Board, and without attaching the order thereto, consequently there was nothing to prevent D. drawing, as he did, moneys for his own purposes.

Held, that the terms of the guarantee in this respect also had not been complied with.

Held, therefore, that the plaintiffs, under these circumstances, could not recover.

ACTION on a policy of guarantee, dated the 5th of April, 1877, and made between David R. Dickson of the first

part, the defendants of the second part, and the plaintiffs of the third part, wherein, after certain recitals, it was agreed the defendants should become security to the plaintiffs, and the defendants thereby covenanted with the plaintiffs to re-imburse to the plaintiffs the amount of any loss, not exceeding in the whole the sum of \$2,000, which, during the continuance of the policy, should be sustained by the plaintiffs by reason of any act of fraud or dishonesty of the said Dickson in his employment as secretary-treasurer in the service of the plaintiffs: that afterwards, and during the continuance of the policy, Dickson, as such secretary-treasurer, received for the plaintiffs certain moneys for and on account of the plaintiffs, amounting to the sum of \$1,000, and did not duly and faithfully account for and pay over the same, or any part thereof, to the plaintiffs when demanded, but fraudulently and dishonestly kept and appropriated the same to his own use, and the plaintiffs sustained loss and damage, &c.

Pleas: 1. Denial of policy.

2. That Dickson did not fraudulently and dishonestly keep and appropriate to his own use the said money of the plaintiffs as alleged.

3. That the defendants, by the terms of the policy, granted the same to the plaintiffs, relying upon the truth of the declaration contained in a certain statement distinguished as "Employees guarantee proposal No. 3547," dated the 20th of March, 1877, signed by William Clarke, the plaintiffs' chairman; and relying also upon the strict performance and observance thereafter by the plaintiffs of the contract by the declaration created, and the truth of the said declaration, and of the representations therein made, and which were by the said declaration declared to form and did form the basis of the guarantee created by the policy. And it was by the policy agreed that the said policy should remain in force so long only as the contract by the declaration created should be strictly performed and observed by the plaintiffs; and it was agreed by and on behalf of the plaintiffs in the declaration that the accounts

of the said secretary-treasurer would be balanced and closed by the plaintiffs at the end of each year, and that the cash and securities belonging to the plaintiffs and appearing to their credit, would be examined and verified by the plaintiffs' auditors at each time that they should balance the accounts of the secretary-treasurer ; and averring breach of each of these conditions, whereby the policy ceased to be in force at the end of the year 1877, and the default of Dickson in the declaration mentioned occurred after the end of the year 1877.

4. That the policy was granted upon the truth of the declaration contained in the said guarantee proposal, in which certain questions were asked, one of which was : "In what capacity do you now require this security from him ? What will be the nature of his intended duties and responsibilities, and the system you will adopt to prevent or detect any irregularity in the performance of his duties ?" Answer. "As secretary-treasurer."

Another question was : "When and how often will his accounts be balanced and closed ?" Answer. "At the end of each year."

Another question was : "Will the cash and securities appearing to your credit at each balancing time be examined and verified ? And, if so, by whom ?" Answer. "Yes ; by the auditors, as required by statute."

Another question was : "What is the greatest amount of money or negotiable or convertible securities which will at any time be in his custody ?" Answer. "Not more than from \$2,000 to \$3,000."

Another question was : "Please state how long such amount will remain in his hands or within his absolute control, and whether all such money and securities are deposited in the bank daily, or how and by what authority they will be drawn out ?" Answer. "All moneys in hand will be deposited in bank. Only by authority of the board." And it was a condition of the policy, that "if the business shall at any time cease to be conducted, or the accounts to be kept and rendered between them in the manner

described in the declaration without the consent in writing of the directors first given, then the policy shall be void." And the defendants aver that the plaintiffs negligently, and contrary to the said agreement, omitted to balance and close the accounts of the said secretary-treasurer, and the plaintiffs' auditors did not examine and verify, and they also wilfully and negligently, and contrary to the said agreement, omitted to examine and verify the cash and securities of the plaintiffs, appearing to their credit at the end of the year 1877 ; and the plaintiffs permitted the said Dickson to draw from time to time, as he saw fit so to do, the moneys deposited in the bank to the credit of the plaintiffs without the authority of the plaintiffs ; and that thereby the business ceased to be conducted in the manner described in the said declaration, and the defendants did not consent that the said business should cease to be so conducted in the manner described, whereby the said policy became void.

5. It was agreed by the policy that it should remain in force so long only as the contract by the declaration created should be strictly performed and observed by the plaintiffs; and it was agreed by and on behalf of the plaintiffs by the declaration that the moneys of the plaintiffs would be deposited in a bank, and that the same would drawn out of the bank only by authority of the plaintiffs. And the defendants say that the plaintiffs allowed the said secretary-treasurer to draw the said moneys of the plaintiffs out of the bank on his own authority, and without the plaintiffs' authority, whereby the policy became void.

6. This was very similar to the fifth plea.

7. That by the terms of the policy it was provided that "the policy should extend to cover any such losses as may have been incurred by reason of any act of fraud or dishonesty committed by the employee within the period of twelve months previous to the date of any notice of claims that may be made under it." And the defendants say that the loss complained of by the plaintiffs was not

incurred by reason of any act of fraud or dishonesty committed by the said secretary-treasurer, within the period of twelve months prior to the date of any notice of claim made under the policy.

8. The policy was subject to the following condition : "The party entitled to make a claim under the policy must immediately upon discovering or receiving notice that any default on the part of the employee has been made, forward a written statement of all the particulars thereof, so far as the same shall have been then ascertained, to the directors, and this policy shall become absolutely void, both as to existing and future liabilities, if such claimant shall neglect or omit for ten days after making such discovery or receiving such notice to forward such statement as aforesaid." And the defendants say that the plaintiffs did not, immediately upon discovering or receiving notice that the default complained of on the part of the employee had been made, forward a written statement of all the particulars thereof, so far as the same had been then ascertained, to the directors, and that the plaintiffs neglected and omitted for ten days after making such discovery to forward such statement, whereby the policy became void. Issue.

The cause was tried before Burton, J.A., and a jury, at Brantford, at the Spring Assizes of 1879.

The evidence shewed that Mr. Dickson was appointed secretary-treasurer in March, 1877, and that he entered on his duties in April following. The education account in the bank was kept in the name of "The Paris Board of Education." The money received by Mr. Dickson was, it may be said, all deposited by him to the credit of that account, and when money was paid out, it was done by a printed form of order signed by the chairman of the Board and by Mr. Dickson, as secretary, addressed to Mr. Dickson as treasurer, directing him to pay the bearer, naming him, so much money, and specifying the service for which it was payable. Upon that Mr. Dickson, as secretary-treasurer, would sign a cheque for the amount in favour of the person who was to get the money, to be paid by the bank, and he

would take a receipt from the person to whom he gave the cheque, upon and at the foot of the order, which receipt was not dated. The cheque was not signed by any other person, nor was the order to pay attached to the cheque, and Dickson could, so far as the bank was concerned, draw from the bank by his own act whatever money he pleased at the credit of the board. From the first month Mr. Dickson was appointed, April, 1877, until he resigned at the end of 1878, he was, with the exception of June, 1877, in default. In place of having, for instance, at the end of September, 1877, \$614.33 at the credit of the board account with the bank, he had only \$1.35, having applied the difference \$612.98 to his own use.

Mr. Dickson's accounts at the end of 1877, were audited by the auditors of the town of Paris. That audit shewed a balance in Mr. Dickson's hands :

Account, High School funds	\$ 77 95
And of Public School funds.....	660 89
<hr/>	
Total	\$738 84

At that time Dickson had in fact on hand only \$64 64

Being then in default\$674 20

The auditors did not go to the bank to see that the \$738.84 they reported as being in Mr. Dickson's hands, was actually there; but they took his bank book balanced to the end of the year, which shewed a sum of \$1,237.72 to the credit of the account, and finding that there was so much more money in the bank than the audit required he should have, they were satisfied, and asked Mr. Dickson no questions.

The way that state of accounts was brought about was as follows : Mr. Dickson had at the credit of the account with the bank \$1,237.72, and he had charged the orders dated the 31st of December, 1877, for which he was to give cheques in favour of sundry persons, amounting together to \$1,173.08. These orders had not been paid by cheques, or, if cheques were given, they had not been presented to the bank on the 31st of December, and so the

balance at the bank stood then at the sum of \$1,237.72, as before stated. But in the books these orders, amounting to \$1,173.08 were charged on the 31st of December, 1877, and they were audited as payments made in that year, which made the balance of money in his hands appear to be only \$738.84. The auditors, by merely taking the balance at the bank, or as it appeared by the bank books, at the end of 1877, and not examining the items of the bank account by which that balance was left to see if it corresponded with Mr. Dickson's office books, did not and could not know that the bank account did not include the items comprising the \$1,173.08, which they were auditing and allowing to Mr. Dickson in his accounts as the officer of the board, and as if the \$1,237.72 were the balance in his favour at the bank after the deduction of these items.

Mr. Clarke, the chairman of the board, said Mr. Dickson from time to time gave a statement at the regular meetings of the Board of receipts and expenditure and balances. "I never verified them."

Mr. Dickson said that if the orders before mentioned had been paid in 1877, the bank account would have been overdrawn; and if the auditors had made a careful examination they could have found out that default then by going to the bank, and making enquiry.

He also said that there was an audit of the high-school accounts made by the county auditors. "There is a separate report of the money spent for high-school purposes. They made a report in this connection, and it was sent to the county auditors. The trustees made their report, and sent it to the county auditors. The county audit that report which is afterwards sent to the government. These county auditors did not examine the bank book. They only examined the account with the vouchers."

It appears no claim was made by the plaintiffs for compensation for losses by Dickson's default until the 1st of January, 1879.

The following questions were put to the jury:—

1. Did Mr. Dickson fraudulently and dishonestly appro-

priate any of the moneys of the plaintiffs to his own use ? If so, in what year, and how much in each year ? Ans. Yes ; deficit, 1877, \$674.20 ; 1878, \$170.02.

2. Did the auditors of the school trustees at the end of each year, during the currency of the policy, balance and close Dickson's account, and examine and verify the cash on hand ? Answer. No.

3. Did the municipal auditors audit the accounts, and examine and verify the cash on hand ? Answer. Did audit the account, but not verify the cash.

4. Were all moneys deposited in the bank, and were they withdrawn only by the authority of the board ? Answer. By the authority of the board.

5. Did the secretary-treasurer withdraw the moneys as he saw fit ? Answer. Yes.

6. If there was any default on the part of the treasurer, did it occur within twelve months previous to the notice of claim, or before that time ? Answer. Before and during the twelve months.

The verdict was therefore entered for the defendants, the learned Judge finding on the issues as follows : For defendants on the fourth, fifth, and sixth pleas. For the plaintiffs on the seventh plea, and \$170.02 damages during the year 1878, [the rest of the deficit happening previously]; and on all the other issues for the plaintiffs.

In Easter term, May 22, 1879, *Robinson*, Q. C., obtained a rule calling on the defendants to shew cause why the verdict entered for the defendants should not be set aside, and a verdict be entered for the plaintiffs for such sum as to the Court shall seem right, on the ground that upon the answers given by the jury to the questions the plaintiffs were entitled to succeed ; or why there should not be a new trial between the parties, on the ground that the verdict and the answers of the jury on which it is founded are contrary to law and evidence : that as to the second and third questions, it was not incumbent on the school trustees to appoint auditors under the statute ; and

that the account was properly audited by the proper auditors, and the cash verified.

During the same term, June 5, 1879, *Fleming* (of Brampton,) shewed cause. The evidence shews the plaintiffs did not balance or close the accounts of the employee. As regards all before the 1st of January, 1878, the plaintiffs cannot recover, because they gave notice of a claim for loss on the 1st of January, 1879, and they cannot recover by the terms of the policy for any loss happening more than twelve months before the date of the claim made for it. The audits were not made by the proper auditors. Paris is not a town separate from the county. The auditors who made the audit were the auditors for the town of Paris, whereas they should have been the county auditors : R. S. O. ch. 204, sec. 87, sub-sec. 7, sec. 102, sub-sec. 3 ; R. S. O. ch. 205, secs. 35-36. The defence is rested chiefly upon one of the questions, and the answer to it. The part of it which is now material is, "How and by what authority will they" (the moneys deposited in the bank) "be drawn out?" Answer. "Only by authority of the board." The employee, Mr. Dickson, drew out the moneys in question by cheques of his own, without the authority of the board, and by the course of business which he was allowed to pursue he could draw out the money of the plaintiffs to any amount without their authority. There was no one countersigned the cheques on behalf of the plaintiffs. The plaintiffs claim a larger sum than the jury found as the deficiency recoverable for the year within the twelve months after the notice of default given, that is, for the year 1878. The jury found that sum to be \$170.02, which was ascertained as follows ; namely, the default for 1878 being \$844.24, from which was deducted the default in 1877, \$674.20. The plaintiffs cannot claim in any case more than the deficiency of 1878, \$844.22, which is the general balance of 1877 and 1878, less the amount to which the deficiency of 1877, was reduced in June, 1877, 292.85, making it \$551.37. The defendants insist, however, that there was in fact no audit

for 1877. The auditors found more money at the credit of the plaintiffs by the bank pass-book by several hundred of dollars than the treasurer's own office books shewed he had or should have had, and they asked him no questions about it, and made no enquiry at the bank, nor did they examine the books of the bank, as they should have done. If they had done so they would have discovered that in place of giving Mr. Dickson credit as of the year 1877 for the orders, amounting to \$1,137.08, dated the 31st of December of that year, as paid by him upon the last-named day, they should have deducted that sum from the credits he claimed. In which case, in place of finding \$738.84 in his hands, they would have discovered he was a defaulter to the extent of \$674.20. Upon one or more of these grounds the defendants are entitled to retain their verdict.

Robinson, Q.C., contra. The real enquiry is whether the answers to the questions have been properly observed. Dickson had no other cash than what went into the bank, and verifying his cash means nothing more than examining his bank pass book; and all of these moneys were drawn out by the authority of the board, because the board gave an order for the payment of the different sums drawn for. It was not required that the order should be attached to the cheque, nor that the cheque should have been countersigned. It is not disputed that Mr. Dickson imposed upon the auditors; but that is just what the defendants engaged to guarantee the plaintiffs against. The statutes as to the proper auditors to audit the accounts are: R. S. O. ch. 205, secs. 35, 36; R. S. O. pp. 2053, 2059, 2074, 2124; *Harrison's Municipal Manual*, 4th ed., p. 193, sec. 254.

June 27, 1879. WILSON, C. J.—The plaintiffs' claim cannot extend further back than for the year 1878, under the twelve months' limitation clause of the policy.

The next enquiry is, How much are the plaintiffs entitled to recover from the defendants, if entitled to recover at all?

The jury have said \$170.02. The defendants say that is the sum; but that the maximum sum is \$551.37. The plaintiffs claim \$844.22, the deficiency at the end of the year 1878. The computation of the jury is too small, because it assumes the whole of the deficiency of 1877 was outstanding at the end of the year 1878, and that the deficiency of 1877, \$647.20, was increased in 1878 by the sum of only \$170.02, so as to make up the total at the close of that year \$844.22. But it appears from the accounts that the deficiency of 1877, \$674.20, if it is to be considered as being wholly unpaid so long as there is as great a deficiency as that amount still un-repaid, cannot all be allowed, as it has been by the jury, as a deduction from the deficiency at the end of the year 1878, because at the end of June, 1878, all prior deficiencies were reduced, excepting the sum of \$292.85, so that the \$844.22, which was due at the end of 1878, must have been raised to that amount by the sum of \$551.37 having been wrongfully withdrawn by Mr. Dickson after June, 1878. The plaintiffs must, therefore, if entitled to recover, receive the sum of \$551.37, at the least.

I think, however, the plaintiffs are, if entitled to recover at all, entitled to recover the sum of \$844.22, the whole amount of the default which was due at the end of the year 1878. I think so for this reason:

At the end of 1877, the default was the sum of	\$674 20
At the end of January, 1878, it was 753 19 Increased by	\$ 78 99
At the end of February, it was..... 1261 57 Increased again by.....	508 38
At the end of March, it was..... 1046 30 Reduced by	215 27
At the end of April, it was 352 45 Reduced by	693 85
At the end of May, it was..... 351 50 Reduced by..	95

At the end of June, it was \$292 85

Reduced by..... \$58 65

After that it again increased.....

In that state of the accounts when the four payments by way of reduction in March, April, May, and June, amounting together to \$968.72 were made, to which items would they properly be applicable? To the earliest or to the last misappropriations?

If this were an ordinary debtor and creditor account, kept by a bank against its customer, or by a merchant against his purchaser, and no specific appropriation was made of the payments by either debtor or creditor, they would be held by the general rule of law in such a case to be made in discharge of the earlier items of debt; and I see no reason why the like rule should not apply in this case.

Applying that rule then. There was a debt owing by Dickson at the end of 1877, of \$674 20

He increased that debt in January and February, by the sum of 587 37

And in the four following months he reduced his debt by the sum of \$968.72.

These payments paid off the whole of the debt \$674.20 of 1877, and the \$78.99 of the January debt, and \$115.53 of the February debt, and which latter debt was not afterwards much reduced at any time, but was in most of the subsequent months added to.

The following sections of the statutes relate to the appointment and duties of auditors.

R. S. O. ch. 204, sec. 87, "It shall be the duty of the county council" sub-sec. 7. "to appoint, annually, or oftener, auditors, who shall audit the accounts of the county treasurer and other officers to whom public or high school moneys have been entrusted, and who shall report to such council." Sec. 102, sub-sec. 3, and secs. 114 to 119, both inclusive, apply to rural school section auditors.

R. S. O. ch. 205, sec. 3, enacts that there shall be a high school or high schools or collegiate institute in every county,

to be distinguished by prefixing to the words high school or collegiate institute the name of the city, town, or village within the limits of which it is situate; but it shall nevertheless be deemed to be one of the high schools or collegiate institutes of the county, and within the municipal jurisdiction of the county council.

Sec. 11. "For all high school purposes every city, and every town separated for municipal purposes from the county in which it is situated, shall be a county; and its municipal council shall be invested with all the high school powers possessed by county, city, or town councils."

Sec. 35. "The treasurer of every high school board shall give security to the board appointing him for the due and faithful performance of his duties, and shall submit his accounts to the municipal auditors to be audited by them in the same manner as the municipal treasurer's accounts are audited."

Section 36. "It shall be the duty of the municipal auditors to audit such accounts."

I think R. S. O. ch. 204, sec. 87, sub-sec. 7, shews the county council in this case should have appointed the auditors; and that ch. 205, sec. 3, which with sec. 11 makes high schools county institutions "and within the jurisdiction of the county council," constituted the auditors of the county in this case, as the town of Paris is not separated from the county, "the municipal auditors" who, under secs. 35 and 36 of the last mentioned Act, are to audit the accounts of the high school treasurer. And when the plaintiffs, in the application for the guarantee policy, answered that the accounts of Mr. Dickson would be audited "by the auditors as required by statute," it must be assumed they meant and declared that the audit would be made by those persons who were competent and authorized by law to make it, that is, by the auditors of and for the county, and as that was not done, but was done by the auditors of and for the town of Paris, the terms of the policy have not been complied with in strict law.

The rest of the case consists in this, that the accounts of the secretary-treasurer, it is said, were not balanced and closed at the end of each year, and the cash of the plaintiffs' appearing to their credit was not examined and verified by the plaintiffs' auditors at the time they balanced the said accounts; and that the plaintiffs permitted Mr. Dickson to draw from time to time, as he saw fit, the moneys of the plaintiffs deposited in the bank from the bank without the authority of the plaintiffs; and it was because the plaintiffs allowed the moneys so to be withdrawn that the treasurer fraudulently and dishonestly appropriated the same to his own use; while the plaintiffs engaged that the books would be balanced and closed at the end of each year, and that the cash at their credit at each balancing time would be examined and verified by the auditors as required by statute, and that all moneys in the bank of the plaintiffs' would be drawn only by authority of the plaintiffs. That Mr. Dickson drew the moneys from the bank which he misapplied without the authority of the plaintiffs, is true, and by so doing he, in the language of the policy, committed acts of fraud and dishonesty. And the defendants say that, although they guaranteed the plaintiffs from loss resulting from such kind of conduct, they are not, nevertheless, liable upon the policy, because Mr. Dickson, by his own cheque, to the knowledge of the plaintiffs, drew all moneys from the bank which were required by the plaintiffs. The course was, that the chairman of the board and the secretary, who was Mr. Dickson, signed a written order for every cheque which the board authorized to be issued, and upon that written order Mr. Dickson issued his own cheque as treasurer of the board for the required sum. The cheques were not required to be, nor were they, countersigned by any other person or officer, nor was the written order for the payment of the money attached to the cheque, so that the bank had no knowledge, or means of knowledge, whether the cheque was issued by authority of the board; and therefore Dickson had it in his power, it was said, to draw all the money of

the plaintiffs' from the bank upon his own personal cheque as treasurer, without their knowledge or authority.

The plaintiffs say they never gave Dickson the right or the power dishonestly to draw the money from the bank without the authority of the board; and when he drew it without such authority, he was acting, in the language of the policy, fraudulently and dishonestly; and it was in respect of just such acts as these that they required to be indemnified ; and the plaintiffs say that their statement in the application, that the moneys would be drawn from the bank "only on the authority of the board," is literally true, and revealed the whole truth; and that Dickson in drawing the money wrongfully without such order, acted fraudulently and dishonestly by no fault of the plaintiffs.

It would have been a more certain guard and protection against abuse by Dickson of his actual power to draw the money upon his own personal cheque as secretary, if the chairman or some other officer of the board had countersigned, and been required to countersign, such cheque; or if the authority for the payment had been annexed to the cheque, but the plaintiffs say they never engaged to do either of such acts.

If in place of the special order given on each occasion when the money was to be rightfully paid, the board had executed a general power of attorney in favour of Dickson, to sign all such cheques which should be lawful and necessary in the due course of the business and affairs of the plaintiffs ; and under that power he had wrongfully drawn out money for his own use, would that have been a compliance with the declaration of the plaintiffs as contained in this application, that the money would be drawn from the bank only on the order of the plaintiffs ? I am inclined to think it would not, because it is in effect giving to the agent the power to draw the money out on his own order only, in the name of the principal.

And so I think the like rule must be applied where a special order is given in each case to the treasurer, as was done, to pay so much money. *Drawing the money from the*

bank "only on the order of the board," does not mean that the board will authorize Dickson to issue cheques under his own personal signature as treasurer, but that the board will exercise some direct authority or control in drawing the money from the bank, and otherwise than upon Dickson's own cheque as treasurer, and only upon that.

If it do not mean that, it is, however carefully all the antecedent arrangements are conducted preparatory to the drawing of the money, conferring unlimited power upon Dickson to draw what money he pleases.

There is a difference between one having money in his possession, which he is to pay out and apply upon written orders from time to time given to him, and one having only power to get it in a particular way. In the former case the mere possession of the money confers the power to misapply it, and there is no way to guard against the abuse of that power. In the other case the person has not the money, and the bargain is, that he is not to get it, nor to have the power to get it, *but only on the authority of the principal*. But if he has conferred upon him the power to draw it out upon his own cheque as he pleases, and he gets the money by the abuse of that power, he is, in my opinion, drawing it out otherwise than "only on the authority of the board," and he might as well have been given the possession of the money at once and left in the possession of it without the trouble or the precaution of banking it, but that was the very object which it was desired to guard against, and which was the subject of express stipulation.

So that I am, after some hesitation, brought to the conclusion that the giving or permitting Mr. Dickson the right or the power to draw the money from the bank by cheque in his own name as treasurer, and which he could do without the knowledge or control of the board, was not within the meaning or spirit of the declaration made by the plaintiffs as the basis of the guarantee, that the money would be drawn from the bank "only on the authority of the board," and as the plaintiffs permitted that to be

done it was a violation of the policy, and they cannot make the defendants responsible for what was, so far as this assurance is concerned, in reality their own wrongful conduct.

Then as to the alleged default of the plaintiffs to have balanced and closed yearly the accounts of the secretary-treasurer, and to examine the cash appearing at the plaintiffs' credit. These defaults apply, if at all, to the year 1877 only, for the year 1878 was properly balanced and everything duly verified.

I think it must be said when the auditors at the close of 1877 found a balance of \$1237.72 in favour of Mr. Dickson as appeared by his bank pass book, and found that his own books shewed he had and should only have had \$738.84, that they should have asked him for an explanation of that difference, but they did not do so as they said themselves. If they had asked him they might have got the necessary information from him as he does not appear to have told any untruth in respect of his accounts at any time, or if they had compared the bank pass book or the bank account in the bank books they would at once have discovered that while the orders of the 31st of December, 1877, amounting to \$1137.08 had been taken credit for by Mr. Dickson in his own books and account, as payments made by him, these items were not contained in the bank book, because cheques had not in fact been given for the items of that sum at the end of the year.

As the auditors did not compare Dickson's books by the bank books, or even by the bank pass book which they had before them, there was in effect no audit, nor were the accounts for that year balanced, while there were two contradictory balances appearing at the time and to the knowledge of the auditors. Nor was the cash appearing at the credit of the plaintiff's examined and verified, when in place of Dickson having at his credit as the auditors declared \$738.84, he was really a defaulter to the extent of \$674.20, which they would and must have discovered if they had examined and verified the cash appearing at the

plaintiff's credit, and which they were the more imperatively bound to do because of the great and known disparity of the balance on hand at the end of that year between the plaintiffs' books and the bank books.

In my opinion the answers of the jury should have been as follows :—

1. That Dickson did fraudulently misappropriate the moneys of the plaintiffs to the extent of \$844.22 for the year 1878, in place of \$674.20 for 1877, and \$170.02 for 1878. That would entitle the plaintiffs to a verdict on the second plea for \$844.22 damages.

2. The jury should have found the auditors who made the audit balanced and closed the accounts for 1878, and examined and verified the cash on hand for 1878, but not for 1877, in place of answering *No*, that is that the auditors did not do so in either year. That would entitle the defendants to a verdict upon the third plea.

3. They should have found that the auditors, who audited the accounts, did examine and verify the cash, and did audit the accounts for 1878 but not for 1877. That would have entitled the defendants to a verdict also on the fourth plea.

4. The jury should have found that all moneys were not withdrawn from the bank by the authority of the board : that the moneys claimed against the defendants were not so withdrawn, in place of finding they were. Their finding on this part of the case is inconsistent with their finding on the same part of the case in their fifth answer. And upon the general result of the two findings, I think the verdict was rightly entered for the defendants on the fourth plea, as to that part of it which relates to this part of the case, and to the whole of the fifth and sixth pleas.

5. The jury found this rightly, that is, that Dickson did withdraw the moneys as he saw fit. That would entitle the defendants to a verdict on the fifth and sixth pleas.

6. And the jury found this rightly also, that is, that there was default on the part of Dickson more than twelve months before the notice of claim was given by the plaintiffs to the defendants of such default ; and also within

the twelve months next preceding the giving of such notice. That would entitle the plaintiff to a verdict on the seventh plea, as far as the year 1878 is concerned; and the plaintiffs should have a verdict also upon the eighth plea, as regards the year 1878.

Now, that is, as regards the practical result, just the way the verdict has been entered. The only difference, we think, which should be made upon the finding is, that the plaintiff, if entitled to recover, ought to get the sum of \$844.22, upon the second and seventh pleas in place only of \$170.02.

I think, on the two inconsistent findings of the jury, that all the moneys were withdrawn "by the authority of the board;" and that "the secretary-treasurer withdrew the moneys as he saw fit," and rightly interpreted by the learned judge, to mean—upon the undeniable testimony of the plaintiff's own witnesses, and they alone were the witnesses—that the secretary-treasurer had the right to withdraw and did withdraw the moneys as he saw fit; and, if that were so, that the other answer, he withdrew them by authority of the board, was nullified by its repugnancy to the other finding which alone was supported by the evidence.

If it is of any consequence to the plaintiffs to have the sum of \$844.22 entered for them on the second and seventh pleas, in place of the \$170.02 upon the seventh plea, that should be done, and perhaps the defendants may not object to it. If they do not, I do not think it worth while to grant a new trial to have that done, when, in my opinion, it can be of no practical use to the plaintiff.

The rule will be discharged.

GALT and OSLER, JJ., concurred.

Rule discharged.

O'NEILL V. THE OTTAWA AGRICULTURAL INSURANCE COMPANY.

Insurance — Title — Ownership — Incumbrances — Distance of contiguous buildings — Diagram — Number of stoves — Statutory conditions — Just and reasonable conditions — Warranty.

To an action on a policy of insurance against fire, the sixth plea set up a condition of the policy, that the statements contained in the application were to be taken and deemed to be warranted by the insured, and alleged that the plaintiff stated he owned the land in fee simple in his own right on which the insured premises were, whereas he did not. It appeared that he had a deed in fee simple, but had not paid the price.

Held, that there was no untrue representation.

Another plea set up that the insured stated in the application that there was only one stove on the insured premises, whereas there were two.

Held, that this was an untrue statement, which avoided the policy.

The eighth plea set up a condition of the policy, that if the insured's interest in the property was other than the entire unconditional and sole ownership thereof for his own use and benefit, it must be so represented in the application, otherwise the policy would be void, and alleged that the insured had failed to declare therein that other persons were jointly interested in the property, whereby the policy was void. By the application the insured agreed to be bound by the conditions of the policy issued in accordance therewith, but in the application he was not asked to state the above facts.

Held, that to permit this defence to be set up would be a fraud on the insured, and he was allowed to reply such fraud, unless the defendants consented to the plea being struck out from the record.

The eleventh plea set up another condition of the policy, that if the insured's interest in the property should be changed in any manner, whether by act of the parties or by operation of law, the policy should be void, and alleged that after the issuing of the policy the insured mortgaged the property, whereby his interest became changed and the policy avoided.

Held, this plea, which was proved, constituted a good defence, and avoided the policy.

The application herein contained the following memorandum: "Annex diagram shewing size and distance of all buildings within 500 feet" of the insured premises; and the application concluded: "I hereby make application for insurance as above specified, and I declare that the answers to the above questions and the description in the annexed diagram are true and complete in all particulars." The back of the application was headed "Diagram," with directions as to filling it up. In the policy it was stated that the application and survey is hereby referred to as forming part of the policy. There were two buildings, one 18x20, and another smaller one, within the 500 feet, omitted from the diagram.

Semble, that the diagram was a part of the application within the meaning of the condition making the statements in the application warranties; and that the omission of the two buildings, at all events the larger one, would avoid the policy; but that the statement in the diagram of a building being 190 feet instead of 178 feet was so slight a

difference as to be immaterial, and the jury having found in plaintiff's favour thereon, the Court would not interfere.
The policy was issued on 2nd May, 1876, being before the coming into force of the Fire Policy Act of 1876. *Held*, that the policy did not come within the Act so as to make the statutory conditions applicable; and even if the Lieutenant-Governor's proclamation, provided for by the Act of 1875, was issued before 1876, but of this there was no evidence, the Court under such Act would only be enabled to say what conditions were just and reasonable.

Semble, per WILSON, C. J., that the conditions set out in the sixth and eleventh pleas were just and reasonable, but not that set out in the eighth plea.

ACTION on a fire policy.

Third plea: that there were two buildings or sheds, one within thirty feet and the other within twenty feet of the insured premises, which were not shewn on the diagram annexed to the application, or in the application; and as the application required all buildings to be shewn on the diagram which were within five hundred feet of the insured premises, and as all such statements were required to be true and complete, and were to be taken as warranted, and were to be a part of the policy, and as the description in the diagram was not true and complete in that respect, the policy was and is void.

Fourth plea: that by a condition of the policy the statements contained in the application were to be taken and deemed to be warranted by the insured, and that the diagram, which was made a part of the application, represented the dwelling house insured to be distant from the stable number one, 190 feet, whereas it was distant from the said stable only 178 feet, it was in that respect untrue, whereby the policy was void.

Fifth plea: setting up the condition set out in the fourth plea, and alleging the plaintiff represented in the application there was one stove in the insured premises, whereas there were two stoves in the same, whereby the policy was void.

Sixth plea: setting up the said condition, and alleging that the plaintiff stated in his application he owned the land in fee simple in his own right, on which the insured premises were situated, whereas he did not

then own the said land in fee simple in his own right, whereby the policy was void.

Eighth plea : that by a condition of the policy it was provided that if the interest of the plaintiff in the property to be insured be other than the entire, unconditional, and sole ownership of the property for the use and benefit of the plaintiff, or if the property be incumbered by mortgage, judgment, or otherwise, it must be so represented to the company in the application, otherwise the policy will be void ; and that at the time of making the application and policy the interest of the plaintiff was other than the entire, unconditional, and sole ownership of the said property for the use and benefit of the plaintiff, and that other persons were then jointly interested therein with the plaintiff, yet the plaintiff omitted to state or represent such fact in the application, whereby the policy was void.

Eleventh plea : that it was among other things a condition of the policy, that if the interest of the plaintiff in the insured property should be changed in any manner, whether by the act of the parties or by the operation of law, the policy should be void ; and that after the making of the policy the plaintiff sold and conveyed the said property by way of mortgage to Messrs. James and Elmes Henderson, and by another mortgage to the London and Canadian Loan and Agency Company, and the interest of the plaintiff in the said premises thereby became and was changed, whereby the policy became void. Issue.

The cause was tried before Galt, J., and a jury, at Guelph, at the Fall Assizes of 1878.

The policy was dated the 2nd of May, 1876, and was for an insurance for three years from that day.

The property insured was as follows :

Dwelling house, 30 x 22.....	\$100
Ordinary contents.....	300
Barn, No. 1, 62 x 30.	300
Ordinary contents	700
Stable, No. 1, 36 x 24.....	150
Ordinary contents	150
Shed, No. 1, 80 x 20.....	200

Ordinary contents	300
Shed, No. 2, 62 x 12.....	100
Ordinary contents.....	200
Total.....	\$2,500

situate upon the west half of lot No. 15, in the 8th concession of Mono.

The fire was on the 13th of December, 1877.

The plaintiff said his total loss was \$3,427.62, and his loss upon the property and articles covered by insurance was \$2,150.

The plaintiff's evidence shewed that the land was owned by his father, who died intestate about eighteen or nineteen years ago. The family owned it after the father died, and had occupied it since his death until the plaintiff bought it from his brothers and sisters at a public sale. He bought the place for \$2,400, and the swamp, which is called the other place, at \$1,500. He got his deed from them on the 26th of April, 1876. He gave his brothers and sisters no security for the payment of the purchase money, and he did not pay them until the spring of 1877, about a year after he had got his deed. The plaintiff, on the 23rd of January, 1877, made a mortgage to the London and Canadian Loan and Agency Company upon the land in question, and other lands, to secure the re-payment of \$2,500, then lent to him, and it was by that means he paid his brothers and sisters the purchase money of the land they conveyed to him. He applied to James and Elmes Henderson for a loan of \$1,800, before he applied for insurance, and the application for such loan was pending at the time the application for insurance was made; and in pursuance of such application for the loan, he executed a mortgage to the Messrs. Henderson upon the 18th May, 1876, upon this and other lands, to secure the re-payment of the \$1,800. That transaction afterwards fell through, and the mortgage, which had been registered on the 28th of June, 1876, was discharged in January, 1877.

The plaintiff said, when he applied for insurance to Mr-

Martin, the defendant's agent, he told Mr. Martin he had applied for the loan of \$1,800 to the Messrs. Henderson, and he told him because Mr. Martin asked if the place was encumbered ; and he told him (Martin) the place was the same as encumbered, because he was lifting money on it, and Martin answered, "Never mind, that makes no difference."

He also said he got the deed from his brothers and sisters, because he was to borrow the money upon it, and pay them off.

The fire, it is said, originated between four and five o'clock in the morning, as was said by the plaintiff at one time, or between four and six in the morning, as he said at another time. It originated up-stairs, where no one then slept. There were two stoves then in the house, one in the main kitchen, the other in the back kitchen or lean-to. The stovepipe of the stove in the main kitchen passed into a stone chimney above the mantelpiece in that kitchen. The stovepipe of the stove in the back kitchen went up and by an elbow passed into a brick chimney built upon the rafters of that back kitchen, and passed all the way up the flue of that chimney through the roof of that back kitchen. There was no fire in the house the night before the fire but that which was in the stoves, and only the common fires, just what would make the house comfortable, and just what was always left in them.

The fire happened when the plaintiff and his family were in bed. The plaintiff was awoke by the smoke. He ran up-stairs as far as he could, but he could not get up for the smoke. He saw the whole of the up-stairs then on fire. He came down and gave the alarm ; and soon after getting his family out of the house he discovered the barn had taken fire at a point two hundred feet to the south-east from the back kitchen ; then the stable took fire.

He said he had only one cook stove, which always stood in the back kitchen, and one heating stove, which stood in the main kitchen.

The jury found a verdict for the plaintiff upon all the

issues, except the sixth, eighth, and eleventh, which were found for the defendants ; and they assessed the plaintiff's damages at \$2,058.83.

In Michaelmas term, November 20, 1878, *McCarthy*, Q. C., obtained a rule calling on the defendants to shew cause why the verdict on the sixth, eighth and eleventh issues should not be set aside, and a verdict entered for the plaintiff thereon with the damages assessed, pursuant to leave reserved, on the ground that the said issues were not proved : that the answer of the plaintiff, stated in the sixth plea was not untrue ; and, even if untrue, it was a misrepresentation only, and as it was not fraudulent it would not avoid the policy : that as to the eighth issue, the plaintiff was at the time of the insurance the entire, unconditional, and sole owner of the property, as he had alleged ; and at any rate he was so possessed thereof : that his said answer was not a concealment which would avoid the policy : and as to the eleventh issue, that there was not any such condition in or endorsed on the policy as is in the eleventh plea alleged, and that all the said pretended conditions are void, not being conditions authorized by the statutes to secure uniform conditions in policies of fire insurance.

W. Mulock, for the defendants, also obtained a rule calling upon the plaintiff to shew cause why the verdict entered for the plaintiff on the third, fourth, and fifth issues should not be set aside, and a verdict entered thereon for the defendants ; or why a new trial should not be granted on the ground of misdirection of the learned Judge in telling the jury that the answer in the application as to the description of the insured premises in the application, diagram, and policy were not warranted.

In this term, May 29, 1879, *W. Mulock* shewed cause to the plaintiff's rule and supported the defendants' rule. The sixth plea alleges that the plaintiff represented in his application that he owned the land on which the insured buildings stood in fee simple in his own right, while the evidence

shews that, although he had got a conveyance to himself in fee of the land from his brothers and sisters of their shares in the land which they held in common with him, he had not at the time of his application for insurance, nor at the time of the policy issued, nor for eight months or more after the date of the policy, paid anything whatever upon the purchase money of the land. The price of it, therefore, the whole \$2,400, was an equitable charge and lien upon the land, and the plaintiff did not then own the land in fee simple in his own right. The eighth plea is still stronger against the plaintiff, because it is plain from the facts of the case that the plaintiff had not at the issuing of the policy the entire, unconditional, and sole ownership of the land for his own use and benefit, and other persons were then jointly interested in it with the plaintiff. The eleventh plea shews a direct violation of the condition by the making of the mortgage to the loan company subsequent to the policy. If any objection could be taken to the conditions set forth in these pleas under the late Act as to uniformity of these policy conditions, it is a sufficient answer that the policy was issued on the 2nd of May, 1876, and, although that was after the passing of the Act, yet it was before the day when the Act was to take effect, and therefore the Act does not apply to the policy: *Naugter v. Ottawa Agricultural Ins. Co.*, 43 U. C. R. 121, 127. As to the defendants' rule. The third plea shews two buildings were on the property, not described in the diagram, nor mentioned in the application or policy, within the prescribed distance of five hundred feet, in fact within the distance of thirty feet of the dwelling house, one of them being a shed or building 18 by 20 feet. And the fourth plea shews the stable described to be 190 feet distant from the house is only 178 feet. Both of these are valid defences. The fifth plea shews that while the plaintiff represented he had only one stove on the premises he had in fact two, and that such misrepresentation avoided the policy.

McCarthy, Q. C., contra. As to the defendants' rule the

evidence does not shew that there were two stoves, nor more than one at the time of the insurance ; and there is no condition that another stove shall not be put into the house. As to the third and fourth pleas, the case of *Wilson v. Standard Ins. Co.*, 29 C. P. 308, shews the diagram is not a warranty of the sketch being absolutely correct, or of the distances being as stated ; and *Naugter v. Ottawa Agricultural Insurance Co.*, 43 U. C. R. 121, 127, shews that two such small buildings as are omitted from the diagram, will not be held to be in anyway material. As to the plaintiff's rule. As to the sixth plea, the plaintiff had an absolute estate in fee simple in the land to his own use by deed of conveyance. The fact that he owed the purchase money of it to the vendors did not affect his title. The eighth plea raises substantially the same question, because it relies on the non-payment of the purchase money, by reason whereof the plaintiff was not the entire, unconditional, and sole owner of the land for his own use and benefit, and inasmuch as the vendors were thereby jointly interested with the plaintiff in the land : *Hughes v. Kearney*, 1 Sch. & Lef. 132; *Drifill v. McFall*, 41 U. C. R. 313; *Mason v. Agricultural Mutual Association of Canada*, 16 C. P. 493, in appeal, 18 C. P. 19. As to the eleventh plea. A mortgage made by the insured after his insurance, is not a change of interest in the property of or by the insured : *Parsons v. Standard Ins. Co.*, 43 U. C. R. 603; *White v. Agricultural Mutual Assurance Co.*, 22 C. P. 98; *Fowkes v. Manchester and London Assurance Association*, 3 B. & S. 917; *Brogan v. Manufacturers, &c., Mutual Ins. Co.*, 29 C. P. 414. The defence set up in these three last named pleas are within the operation of the statute relating to the uniformity of policy conditions. It is true the Act did not come into operation until after this policy was made; but sec. 1 of the 39 Vic. ch. 24, uses language apparently applying to policies which are in operation before and at the time of the passing of that Act, and which continue in operation after it. That section is: "The conditions set forth in the

schedule to this Act, shall, as against the insurers, be deemed to be part of every policy of fire insurance *hereafter entered into or renewed or otherwise in force in Ontario.*" And by reference to the 38 Vic. ch. 65, sec. 2, it will be seen that after the Lieutenant-Governor by proclamation published in the Ontario *Gazette* assents to the said conditions, any policy is entered into or renewed, containing any conditions other than or different from the condition so previously approved of and deposited ; and if the said conditions so not contained is held by the Court or Judge before whom a question relating thereto is tried, to be not just and reasonable, such condition shall be null and void. Now the conditions referred to in the Act of 1876, under the words *or otherwise* in force in Ontario, can only refer to those conditions which, by the Act of 1875, the Lieutenant-Governor by his proclamation had assented to, and that assent was certainly before the year 1876, so that the defence raised by these three last named pleas, are properly subject to the provisions of the Act of 1876, and they are void because not properly endorsed according to that statute. If the plaintiff should have replied a waiver by the agent of the insertion in the diagram of the two buildings referred in the third plea, leave is asked to add such a replication.

June 27, 1879. WILSON, C. J.—I am of opinion this policy is not within the Act of 1876, 39 Vic. ch. 24, which provides for the uniformity of conditions in fire policies. This policy, which was issued before the Act "shall take effect," was valid when it issued so far as that Act, although passed before the issuing of the policy, is concerned. It was not required to have upon it either the statutory conditions or the variations referred to in that Act. If the proclamation of the Lieutenant-Governor was issued before the Act just referred to was passed or took effect, and of that there is no evidence—Mr. McCarthy said he had looked for it and could not find it—the greatest effect which could be given to it would be to hold that it enabled us under the Act of 1875, 38 Vic. ch. 65, to say whether the conditions set

out in the sixth, eighth, and eleventh pleas were just and reasonable conditions or not ; and upon that point there is no reason why the conditions referred to should not, as to the sixth and eleventh pleas, be held to be just and reasonable. The title of the plaintiff to the land on which the property stands is a very usual and proper condition ; and so also is the condition providing against a change of the interest of the insured in the property insured. I should not hold the condition in the eighth plea to be just and reasonable, if I had to determine it upon that ground.

The case of *Naugter v. Ottawa Agricultural Ins. Co.*, 43 U. C. R. 121, 127, shews that policies issued before the Act of 1876 are not within the operation of the Act, if authority be required for that purpose.

I shall dispose of the plaintiff's rule first, which relates to the sixth, eighth, and eleventh pleas, because if they are, or any one of them is, determined in the defendants' favour, it will be of little or no use to consider the effect of the evidence upon the third, fourth, and fifth pleas, which were found against the defendants.

As to the sixth plea. We have to enquire when the plaintiff, in answer to the question in the application, "Does the applicant own the lands in fee simple in his own right, or, if not, who does ?" said, "Yes; in fee simple," whether his answer was untrue when the only objection to it is that he had not paid the price of the land, although he had a deed in fee simple to him of the land from the undoubted owner of it.

It appears to me it was not an untrue answer. The plaintiff did own the fee simple in his own right, and not for or in right of any other person, and he was not asked in respect of incumbrances or of any other matter than simply where the legal title was. The case of *White v. Agricultural Mutual Assurance Co.*, 22 C. P. 98, expressly applies.

The eighth plea is based upon a condition in the policy, which declares "that if the interest of the insured in the

property be other than the entire, unconditional, and sole ownership of the property for the use and benefit of the insured, or if the property be incumbered by mortgage, judgment, or otherwise, it must be so represented to the company in the application, otherwise the policy will be void"; and it is alleged that the plaintiff had not such a title or interest, because other persons were then jointly interested with him in the property, and he did not declare such fact in the application.

This plea does not complain of encumbrances of any kind. The complaint is, that as the interest of the plaintiff was other than the entire, unconditional, and sole ownership of the property for the use and benefit of the plaintiff, and other persons were then jointly interested in the property with the plaintiff, the plaintiff omitted to state such fact in, and the same was not stated in the application, whereby the policy became void. The application does say that the applicant consents to be bound by the conditions of insurance set forth in the policy to be issued in accordance herewith, and that is trusting a good deal to chance as to the conditions which may turn up when the policy issues, although that is pretty well guarded now by the power reserved to avoid all conditions which are not just and reasonable. But how a company can defeat a policy by declaring that it should be void if something is not stated in it which the applicant was not asked about or required to state, and which he had no means or opportunity of stating, or of conjecturing that he had to state it, I cannot comprehend, unless we reverse all the rules of ordinary business proceedings and fair dealing. The company might as well declare the policy to be void, if there were any other insurance on the property, or if there ever had been any, or if there were any taxes in arrear, and all these matters were not specially set forth in the application, although the application required none of these things to be mentioned or answered; or defeat the policy because the age of the applicant, or the number of his household was not mentioned in the application, although the appli-

cant had no notice or warning that such particulars were required of him.

While an applicant may propose for an insurance which is to be subject to such conditions as the policy, which he has never seen and knows nothing of, may contain; and that, as I have said, is trusting rather desperately, it never can be supposed that one of these conditions is to be of such a character as to defeat of necessity the completion of the very insurance bargained for. You may defeat a contract by a subsequent violation of it; but it is a new thing to defeat a contract because one of the parties has not done what he was never asked or required to do, and which he could not have done without a previous notice or request, yet that is this case. And it appears to me to be a fraud upon the plaintiff, although I do not mean to say it was a wilful or intentional, or as it is generally called, a moral fraud on the part of the defendants; and the plaintiff should be allowed to reply to such fraud, if he desire it, and to try it, unless the defendants consent to strike that plea out of the record.

As to the eleventh plea, it is free from the objection stated to the eighth plea. This plea states that after the making of the policy the plaintiff sold and conveyed the said property by way of mortgage to the London and Canadian Loan and Agency Company, and the interest of the plaintiff in the said insured premises thereby became and was changed—and, the policy says, changed in any manner—and thereby the policy became void. That is one of the conditions of the policy, and it was literally proved. The defendants are entitled to retain their verdict upon that issue.

As to the pleas upon which the defendants claim to have a verdict or a new trial. The third plea alleges there was a building, which the evidence shews was 18x20, and another smaller building, both within thirty feet of the house, and they were not set out upon the diagram as they ought to have been. This diagram should have shewn all buildings within five hundred feet of the insured buildings, and by

the applicant it is declared in his application "to be true and complete in all particulars." The policy on its face states that as regards the description of the property insured, the *application and survey* (the latter term meaning, I presume, the diagram) "is hereby referred to as forming a part of this policy." The condition on the policy then declares that "all statements contained in the *application* will be taken and deemed to be warranted on the part of the assured."

The question then is, Is the *diagram* a part of the application? There is a writing headed "application." There is in that writing a memorandum : "*Annex diagram, shewing size and distance of all buildings within 500 feet;*" and the conclusion of that writing is: "I hereby make *application* for insurance *as above specified*, and I declare that the answers to the above questions and the description *in the annexed diagram* are true and complete in all particulars;" and on the back of that writing it is headed: "diagram," and directions are given how it is to be filled up. The policy in the body, it will be observed, speaks of the application and survey as one document, because it says the application and survey *is* hereby referred to, &c. In the application, the *application* and *diagram* are referred to as different matters or writings, and this condition of the policy refers to the statements contained in the *application* being taken to be warranted.

I am not quite clear that the condition does include the diagram under the term application, although I am inclined to think it is so embraced.

Construing the condition in that way, I am of opinion the two buildings, the larger one, at any rate, should have been described in the diagram, and because that has not been done the condition has been broken, and the defendants are entitled to recover upon that issue.

As to the fourth issue, I do not consider the slight difference in the distances to be material, and as the jury have found that for the plaintiff I should not disturb it.

As to the fifth plea, the defendants are entitled to

recover because the plaintiff has expressly to the question, "Number of stoves" answered, "one," while his own evidence shews he had two. He said : "Cookstoves in the list means cookstove ; there was just one. * * It was always standing in the back kitchen. The heating stove stood in the hearth in the big kitchen. It was always there ; that is where we kept it. * * I bought the box stove at the sale ; that was in the spring of 1876. When I bought it, it was not standing in the main kitchen. It was not *stood* up the day I bought it. When I took possession I set it up on the hearth." But if the plaintiff cannot say that the stove in the big kitchen was not up at the time of the application made, and we think he is not able to say that, it would be useless to grant a new trial upon that issue.

When I refer to the two stoves being up at the time of the application, I am considering them as up, although one of them may, for the mere purpose of cleaning or the like, have been taken down or removed, and that the intention was to replace it at once.

My opinion is, that when he made the application he had the two stoves, but probably the one in the main kitchen for heating was not in use on the 2nd of May, and that what the plaintiff meant when he said he had only one stove, was, that he was using only one stove. I think the fifth plea was proved.

The result is, I think the plaintiff should have a verdict on the issue on the sixth plea, and should retain his verdict on the issue on the fourth plea : that the defendants should retain their verdict on the issue on the eleventh plea, and that they should have a new trial on the issues on the third and fifth pleas, if they desire it, but I presume they do not ; and that the plaintiff should be allowed to reply fraud or the special facts to the eighth plea, unless the defendants will consent to strike it out of the record, which I think they should do.

As the defendants retain their verdict on the eleventh plea, it is really immaterial to them how the verdict is upon

the third and fifth pleas, if the cause is to end here; but, if it is not, it may be material to them not to waive their rights as to a finding upon these two pleas. Strictly under the R. S. O. ch. 50, sec. 283, we have the power to direct the verdict on these two pleas to be entered for the defendants, and I think it will be better to do so.

The rules will therefore be disposed of as follows: That the verdict be entered for the defendants on the third, fifth, and eleventh pleas; and for the plaintiff on the fourth and sixth pleas; and the defendants consenting (which no doubt they will do) that the eighth plea and the issue upon it, be struck out. Each party will take out their respective rules accordingly.

GALT, J., concurred.

OSLER, J., took no part in the judgment, having been engaged in the case while at the bar.

Judgment accordingly.

ANDERSON ET AL. V. MATTHEWS ET AL.

Action by husband and wife—Accident—Negligence—New trial—Smallness of damages.

Action by husband and wife for damages sustained by them by the upsetting of a buggy in which they were driving, by reason of its coming in contact with a large stone negligently left by the defendants on the highway. In the first two counts the wife claimed damages for personal injuries sustained by her, and in the last two the husband claimed for the loss of his wife's society and services, and for expenses incurred in medical attendance; also for damage to his personal property. It was proved that the wife was very seriously injured, and that the husband had incurred expenses for medical attendance, and that his buggy was damaged to the extent of \$30. The jury found as follows: "Verdict for the plaintiffs on the first and second counts, and \$130 damages. No damages on the last two counts."

Held, that although a new trial would not be granted for smallness of damages on the first two counts, yet as there must be a new trial on the last two counts, and, as no additional expense would be incurred thereby, justice would be done by granting a new trial on the whole record, without costs.

THE declaration contained four counts. In the first and second the plaintiff Avalinah H. Anderson claimed damages for injuries caused by the upsetting of a buggy in which she and her husband, the co-plaintiff, were driving.

In the third and fourth the latter sued for the loss of the comfort and services of his wife, expenses incurred in nursing and attendance, and for injuries to the horse and buggy.

The defendants pleaded not guilty.

The cause was tried before Burton, J. A., and a jury, at Simcoe, at the Spring Assizes of 1879.

The evidence clearly established that the accident was caused by the collision of the buggy with a large stone which had been left by the defendants on the highway. The night was dark, but the defendants contended that a lamp, which was burning about thirty-eight feet from the stone, and about nine or ten feet from the middle of the road, afforded sufficient light to have enabled the plaintiffs to avoid driving against the stone, and that they were therefore guilty of contributory negligence.

The injuries caused to the female plaintiff were of a very serious character. As to one of them it was doubtful whether she would ever quite recover from the effects of it, and from the others the recovery would be slow and tedious, at least twelve months.

The other plaintiff sustained no bodily injury, but his buggy was damaged to the extent of \$30. He was a medical man, but other medical men had also been called in to attend his wife.

There was no objection to the Judge's charge.

The jury brought in the following verdict: "Verdict for the plaintiffs on the first and second counts, and \$130 damages. No damages on the last two counts."

The attention of the jury was called to the apparent absurdity of their finding on the third and fourth counts, but they declined to change it, and it was recorded, without comment or suggestion by either party, that upon such a finding a verdict ought to be entered for the defendants or the plaintiffs, with nominal damages.

In this term, May 20, 1877, *McCarthy*, Q. C., obtained a rule *nisi* to set aside the verdict, and for a new trial, on the ground that the damages on the first and second counts were too little, and, if entitled to any damages, the plaintiffs were entitled to much more than the amount at which they were assessed: that no damages were assessed to the plaintiff *Jeremiah Anderson* for the injuries complained of in the third and fourth counts: that the issue joined on the plea to the third and fourth counts has not been disposed of, there being no finding in favour of one party or the other thereon.

During the same term, June 3, 1879, *H. J. Scott* shewed cause. As to the verdict on the first and second counts. The Court will not grant a new trial for smallness of damages, even though they may feel that larger damages might have been awarded, unless there has been misdirection by the learned Judge, or misconduct in the jury, or a mistake by them in the calculation of figures. The ques-

tion of damages is for the jury, and they have found what they deem to sufficient, and there is no objection that there was any misdirection or any such misconduct or mistake : *Mayne* on Damages, 3rd ed., 511 ; *Graham and Waterman* on New Trials, vol. ii., 1166 ; *Hilliard* on New Trials, 2nd ed., 573 ; *Falvey v. Stanford*, L. R. 10 Q. B. 54; *Kelly v. Sherlock*, L. R. 1 Q.B. 686; *Jones v. McDowell*, 12 U. C. R. 214; *Craig v. Corcoran* 24 U. C. R. 406 (a.) As to the third and fourth counts, the evidence fairly justified a verdict for the defendant; at all events, the only damages which the plaintiffs could recover would be the price of the buggy, namely \$30, and it is a settled rule of the Court not to interfere where the amount in dispute is so small.

McCarthy, Q. C., contra. There is no question but that the plaintiffs are entitled to a new trial on the last two counts. There has been, in fact, no finding on the issues joined therein. The jury should have found one way or the other. They should either have found for the defendants, or for the plaintiffs with the damages the evidence shewed they were entitled to, and the evidence clearly shews that they were entitled to substantial damages. The jury having found for the plaintiffs on the first two counts, it must be assumed that there was negligence in the defendants, and no contributory negligence in the plaintiffs. This would entitle the husband to a verdict, with such damages as he was entitled to. The damage to the buggy was not the only damage the husband sustained, for he is entitled to recover for the expenses for medical attendance, as also the damage he has sustained by the loss of the comfort and services of his wife. Then as to the first two counts. The cases shew that there is no inexorable rule of practice precluding the granting of new trials for smallness of damages, and when it appears that the jury have been guilty of misconduct, for instance, when the verdict is the result of a compromise, a new trial will be granted;

(a) See *Phillips v. South Western R. W. Co.*, L. R. 4 Q. B. D. 406, affirmed on appeal, Weekly Notes, Aug. 2nd, 1879, p. 150.

and there can be no other conclusion here than that the verdict was the result of a compromise. The later decisions shew that the rule is very much relaxed in favour of granting new trials for smallness of damages : *Kelly v. Sherlock*, L. R. 4 Q. B. 687, 697; *Dobbyn v. Decow*, 25 C. P. 18; *Armytage v. Haley*, 4 Q. B. 917. On the whole case there certainly must be a new trial.

June 27, 1879. OSLER, J., delivered the judgment of the Court.

The record in this case embraces two distinct actions, viz., one by the wife for personal injuries sustained by her through the negligence of the defendants ; the other by the husband for the loss of his wife's society, services, &c., and damage to his personal property caused by the same negligence which occasioned the wife's injury : R. S. O. ch. 50, sec. 86.

To deal with that part of the rule which relates to the wife's verdict first. If there was no other consideration invoked but that of the smallness of the damages in proportion to the injury sustained, I do not very well see how the Court could interfere to set the verdict aside consistently with any decision to which we have been referred, or I have been able to discover.

In *Armytage v. Haley*, 4 Q. B. 917, which was an action for an injury caused by the defendant in driving his omnibus against the plaintiff, whereby his thigh was broken, and he incurred considerable expense, and it was doubtful whether he would not be always lame, the jury found a verdict for the plaintiff and a farthing damages. The Court made absolute a rule for a new trial on payment of costs, observing that a new trial on a mere difference of opinion as to the amount of damages might not be grantable, but here were no damages at all, and further as to the cases cited by the defendant in opposition to the motion that they were actions not for injury to the person, but principally for slander.

In *Kelly v. Sherlock*, L. R. 1 Q. B. 686, 697, an action of
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libel, Blackburn, J., says that there is no inexorable rule of practice precluding the granting of a new trial on the ground of smallness of the damages; but where the smallness of damages shews that the jury have made a compromise, and instead of deciding the issues submitted to them of guilty or not guilty, have agreed to find for the plaintiff for nominal damages only, a new trial will be granted, such a case being in effect as if the jury had been discharged without a verdict. A new trial was refused.

In *Falvey v. Stanford*, L. R. 10 Q. B. 54, an action of slander, a verdict for one farthing damages was set aside, on the ground that it was merely a compromise verdict, the result of an unwillingness on the part of the jury to find for the plaintiff on the issue of not guilty, with the natural consequences of such a finding, or to find for the defendant.

In *Dobyn v. Decow*, 25 C. P. 18, an action for malicious arrest, the jury found that the defendant acted maliciously and without any reasonable and probable cause, and gave a verdict for one shilling only, the Court applied the principle stated by Blackburn, J., in *Kelly v. Sherlock*, and granted a new trial, with costs to abide the event.

Hagarty, C. J., dissented from the majority of the Court, saying, at p. 36: "Whenever a decided damage, such as a fractured limb or a permanent injury to health, is sustained, and an action brought therefor, I can well understand a verdict against a railway company, or the person committing an assault, for a shilling damages, being regarded as necessarily an absurdity, and as unjust as it is illogical. But where no such permanent or positive injury is done—however feelings may be outraged or indignation naturally excited at scandalous conduct—I hardly see my way to refusing to allow a verdict for a nominal sum to stand."

See also *Diehl v. Evans*, 1 Serg. & Raw. 367.

In the present instance the jury have given the female plaintiff substantial damages, not large damages certainly, nor so much as she would consider herself entitled to, nor

so much as the learned Judge who tried the cause thinks might fairly have been given. Still, how are we to measure them ? It was for the jury to do that, and, unless we could see that there was some misconduct on their part, such as the Court acted upon in the cases referred to, we ought not to interfere merely because we may think that the jury have awarded damages with too niggard a hand.

With the husband's part of the case, however, the jury have dealt, as it seems to us, just in such a way as to entitle him to ask the Court for relief. They appear to have been alive to the absurdity of finding inconsistent verdicts, and yet to have been determined to avoid giving him any damages. The evidence shews clearly that he did sustain injury and damage, as charged in the third and fourth counts. Had nominal damages been given I think we should have been well warranted, on the authority of the cases, in granting a new trial.

In *Grout v. Glasier*, 1 Dowl. N. S. 58, an action on the case, the jury found on the plea of not guilty for the plaintiff, but without damages, and on the plea of payment into Court and as to damages *ultra* for the defendant. It was held that on the record the defendant was entitled to the *postea*, and that unless the Judge amended by inserting nominal damages on the first issue, a *venire de novo* must issue.

Parke, B., said, at p. 59 : "The plaintiff should apply to the Judge who tried the cause, to amend the *postea* by inserting nominal damages. * * If that be not done, the only remedy is by a *venire de novo*. If the jury thought the defendant was guilty of the wrongful act complained of, they should have found some damages; not having done so, they are guilty of a default, and that is a case in which a *venire de novo* is awarded."

In this case a verdict for the defendant would be against evidence, and the plaintiff does not apply to have the *postea* amended by inserting nominal damages. And as the case must go before another jury, and there is no

additional expense occasioned thereby, we think we shall best do justice between the parties by granting a new trial upon the whole record, without costs.

See *Feize v. Thompson*, 1 Taunt. 121.

Rule absolute.

THE ONTARIO COPPER LIGHTNING ROD COMPANY V. HEWITT.

Libel—Charge of imposition by selling goods at too high prices—Excessive damages—New trial.

The libel sued for herein consisted of the statement, in substance, that the plaintiffs who were manufacturers of lightning rods, were charging from 37 to 42½c. per foot for their rods, whereas the defendant could furnish the same and even a better rod for 7c. to 10c. per foot, and that defendant, having a thorough knowledge of the lightning rod business, felt it to be an imposition practised by plaintiffs on the public in charging such exorbitant prices when the rods could be sold at the above low prices. The publication was proved to be untrue, in that the prices charged by the plaintiffs included the cost of erecting the rod, while the sums named by the defendant only included the price of the rod, although the publication, as the jury found, was intended to convey the meaning that they included the cost of erecting it also.

Held, that the action was maintainable.

The jury assessed the damages at \$4,000, but the Court being of opinion that under the circumstances, the damages were excessive, directed a new trial unless the plaintiffs would consent to reduce the verdict to \$1,000.

This was an action for libel, tried before Cameron, J., with a jury, at Hamilton, at the Spring Assizes of 1879.

The declaration contained two counts, each count setting out a separate libel.

The libel set out in the first was as follows :

“ LIGHTNING.

“ To railroad companies, corporations, farmers, and the public generally. The undersigned will furnish any kinds of lightning rods manufactured by the Ontario Copper Lightning Rod Company of Hamilton, meaning the plaintiffs, at

from 7c. to 10c. per foot with fixtures complete. Farmers and others should beware of these so called agents who are hawking lightning rods about the country in the interest of this Hamilton Company," (meaning the agent of the said plaintiffs), "and charging therefor from 37c. to 42½c. per foot, when the undersigned can furnish the same rod and even better from 7c. to 10c. per foot. The undersigned having a thorough knowledge of the lightning rod business, feels that it is an imposition practised on the part of the Hamilton Company," (meaning the plaintiffs) "on the public when they can be sold at the above low mentioned prices. Any one wanting rods will please address S. Hewitt.

"P. S. Any information wanted with reference to the erection of lightning rods and the cost of the same, will please send to above address."

Meaning thereby that the plaintiffs had been and still were imposing upon and cheating farmers and others, their customers purchasing the lightning rods so manufactured, sold, and offered for sale, whereby the plaintiffs were greatly injured in their credit and reputation as a trading and manufacturing company, and lost many customers for their said lightning rods, and were otherwise greatly injured in their said business.

The libel charged in the second count was, that defendants published in a certain newspaper the following:—

"The trade has been injured vastly by dealers of both classes, and it is hard to say which has inflicted the heaviest blows. Several counties of Ontario have been visited of late by persons selling rods manufactured by a Hamilton Lightning Rod Company (meaning the agents of the plaintiff), at unreasonable rates, ranging from 37½c. to 42½c. per foot, when the same article, as every one conversant with the trade very well knows, can be retailed at 7c. to 10c. per foot. These extortionists" (meaning the agents of the plaintiffs), "have not been lacking in diligence, and many a farmer now bitterly regrets having listened to their plausible talk. The discrepancy between the prices demanded by these fellows" (meaning the agents of the plain-

tiffs), "and the price at which it is stated their goods can be put on the market must surprise every one, but we give it on the authority of one of the leading manufacturers of lightning rods, Mr. S. Hewitt. Mr. Hewitt can be heard from by addressing a postal card to box 53, Brantford, Ont. Farmers and others should beware of those so-called agents" (meaning the agents of the plaintiffs), "who are hawking lightning rods about the country in the interest of this Hamilton Company," (meaning, &c.,) "and charging therefor from 37c. to 42½c. per foot, when Mr. Hewitt can furnish the same rods, and even better, from 7c. to 10c. per foot. Mr. Hewitt having a thorough knowledge of the lightning rod business, feels that it is an imposition practised on the part of the Hamilton Company" (meaning the said plaintiffs), "on the public when they can be sold at the above mentioned low prices," meaning thereby that the plaintiffs were imposing upon and cheating the farmers, &c., whereby the plaintiffs were greatly injured in their credit, &c.

Pleas : 1. That the defendants were not an incorporated company.

2. Not guilty.

3. That the matters so published by the defendant were published by way of reasonable caution to the public, and for the public good, and without malice, and were a fair and *bona fide* commentary on the conduct of the plaintiffs.

4. That the alleged defamatory matter in the declaration complained of is true in substance and in fact.

5 and 6. These pleas were pleaded to the first and second counts respectively, and averred that the defendants could, as stated in the publications complained of, furnish the rods at from 7c. to 10c., or 12½c., as good as those for which the plaintiffs charged from 37c. to 42½c.

7. To so much of the whole declaration as alleges that the defendant meant that the plaintiffs were charging and obtaining grossly exorbitant prices for their rods, that the charge is true.

The evidence so far as material is set out in the judgment. At the close of the case the defendant moved to enter a

nonsuit on the ground that upon the pleadings and evidence no libel and no special damage was proved for which the plaintiff can sustain an action.

The objections were overruled, and the case proceeded.

The charge of the learned Judge was as follows : " If this publication, which has been established by the evidence, and which has not been disputed, contained libellous matter, and if it was maliciously published, that is, not for an honest, *bona fide* purpose, but for the purpose of injuring the plaintiffs, then you must find that the defendant is responsible, unless the exception that has been taken in law by the learned counsel for the defence should be correct. But, notwithstanding that I reserve that point for the consideration of the Court, yet, as I understand the law to be now, you are judges of the law in reference to libel as well as the fact, and you may say whether what is complained of here is libellous or not, taking all the circumstances into consideration. As the plaintiffs, whom it appeared had a patent for this rod, it is to be assumed that only they and those to whom they gave the privilege had the exclusive right to manufacture it. Did Mr. Hewitt consider that he was practising an imposition when he sold this rod under the agreement with the plaintiff at $37\frac{1}{2}$ cents a foot ? Had the difficulty that existed between the plaintiffs and defendant anything to do with the issuing of the placard in question here ? If it had, does that indicate that it was issued from an honest motive to serve the public, or was it done from the dishonest and dishonourable motive of desiring to injure the plaintiffs. If the former, the defendant is not guilty of a wilful and malicious libel ; if the latter, he is guilty of a wilful and malicious libel, if the law makes this a libel at all."

The jury found a verdict for the plaintiff, damages, \$4,000.

In Hilary term, February 7, 1879, *Robinson, Q. C.*, obtained a rule *nisi* to set aside the verdict for the plaintiffs, and to enter a nonsuit or verdict for the defendant, pur-

suant to the leave reserved at the trial, on the ground that upon the pleadings and evidence no libel and no special damage was proved for which the plaintiffs can sustain an action; or to arrest the judgment on the said verdict, on the ground that upon the declaration no actionable libel is alleged or shewn, and that there is nothing in the libel as alleged in the said declaration, and in the other allegations in the said declaration contained, upon which the plaintiffs' said verdict can be supported; or for a new trial, upon the ground that the said verdict is contrary to law and evidence, the plaintiffs having proved no cause of action, for the reasons above mentioned, and there being no evidence, or no sufficient evidence, of the untruth of the said alleged libel, or of special damage thereby sustained, or of its application to the plaintiffs, or of its having been falsely and maliciously published by the defendant; or on the ground that the damages are excessive and unwarranted by the evidence.

In this term, May 30, 1879, *McCarthy*, Q. C., and *Osler*, Q. C., shewed cause. The statements are clearly libellous. The cases shew that a mere puffing of goods is allowable. Here, however, the charge does not amount to a mere puffing of goods, but a personal imputation is cast upon the plaintiffs, namely, that the plaintiffs were charging a much higher rate for the rods than they were justified in doing, and for which the defendant could furnish them; and that plaintiffs in consequence were practising an imposition on the public: *Evans v. Harlow*, 5 Q. B. 624; *Harmann v. Delaney*, 2 Str. 898; *Addison on Torts*, 4th ed., 776; *Jenner v. A'Beckett*, L. R. 7 Q. B. 11; *Western Counties Manure Co. v. Lawes Chemical Manure Co.*, L. R. 9 Ex. 218. There was sufficient evidence of special damage. It is not necessary to prove specific cases of damage, for instance, that any particular customer has been lost, but the allegation which is contained in the declaration, and which has been proved, is sufficient: *Evans v. Harries*, 1 H. & N. 251; *Hartley v. Herring*, 8 T. R. 130; *Ashley v. Harrison*, 1 Esp. 48. The libels were false and malicious. The evidence shews that

they were untrue. The amount charged by the plaintiffs included as well the price of the rod itself, as the cost of putting it up, of which the defendant was fully aware, as he had been in partnership with Shoonmaker, the plaintiff's manager, and had sold the rod at the price charged by the plaintiffs, while the price at which the defendant offered to furnish it would only include the price of the rod itself. The evidence also shews that the libels were not published with the *bona fide* honest intent of saving the public from expense, but with a wilful and malicious intent, in consequence of a difficulty the defendant's brother had had with the plaintiffs, of injuring the plaintiffs, and driving them out of the business. Then as to the damages. The evidence shews that in consequence of the libels the plaintiffs were wholly prevented from doing business, and they thereby lost an amount much larger than the jury have awarded as damages. The Court will not interfere in such a case, unless they are of opinion that the jury have taken a wholly exaggerated view of the case. The following cases were also referred to: *Black v. Alcock*, 12 C. P. 19; *Hemmings v. Gasson*, E. B. & E. 346; *Young v. Macrae*, 3 B. & S. 264; *Delegall v. Highley*, 8 C. & P. 444; *Sloman v. Chisholm*, 22 U. C. R. 20; *Marsden v. Henderson*, 22 U. C. R. 585; *Russell v. Wilkes*, 27 U. C. R. 280; *Canada Life Assurance Co. v. O'Loane*, 32 U. C. R. 379; *Holliday Ontario Farmers Mutual Ins. Co.*, 1 App. 483.

Robinson, Q. C., and *Wilkes*, (of Brantford), contra. The publications are not libellous. The law is, that you cannot slander another's goods or himself personally, for instance, by saying that his goods are bad; or of himself that he is no artist, or that he is a bad carpenter; but you may say anything you like by way of comparison of another's goods as to price with your own to such other's disadvantage, for all that amounts to is praise of your own goods, even though such praise may be extravagant. It is nothing more than a mere puffing of goods. This in reality is not not an action for libel, but for a false representation. *Evans v. Harlow*, 5 Q. B. 624, is conclu-

sive against the plaintiffs. The addition of the words, that the plaintiffs were practising an imposition on the public, cannot make any difference, as the article goes on to shew the way in which the imposition was practised, namely, in selling at too high a price: *Western Counties Manure Co. v. Lawes Chemical Manure Co.*, L. R. 9 Ex. 218; *Young v. Macrea*, 3 B. & S. 264; *Boynton v. Remington*, 3 Allen, 397; *Snow v. Judson*, 38 Barb. 210; *Benton v. Pratt*, 2 Wend. 385; *Cooley on Torts*, 202; *Townshend on Slander*, 3rd ed., pp. 333-7, secs. 204-5; *Folkard on Slander*, 4th ed., 159-170. The alleged libel was true, and it was not malicious. The defendant proved that if the rods were sold at the manufactory, it would only cost from seven to eight cents per foot, and directions would be there given so that each person could put up the rods themselves, and the additional expense was incurred through the employment of agents and touters. If, therefore, the defendant could induce persons to come and buy for themselves, all this additional expense would be saved; and this is all that is meant by the alleged libels. In this sense it is perfectly true, and it is perfectly justifiable, for there is no intent of maliciously injuring the plaintiffs, but a *bona fide* intent to save the public expense. The plaintiffs also should have proved special damage. It is essential to have shewn that some particular customers were lost: *Evans v. Harlow*, 5 Q. B. 624. Moreover, the damages awarded were excessive. The evidence shews that no profits had ever been derived out of the business. It is immaterial whether the statement is true or false. If true, he cannot have been damaged, and equally so if false, for if on persons going to the defendant to get the goods he cannot furnish them at the price he states, how were the plaintiffs injured.

June 27, 1879. GALT, J., delivered the judgment of the Court.

To the declaration herein the defendant pleaded: 1. That the plaintiffs were not an incorporated company. It was proved they were.

2. Not guilty. So far as publication was concerned this was proved.

3. That the matters so published by defendant were published by way of reasonable caution to the public, and for the public good and without malice, and was a fair and *bona fide* commentary on the conduct of the plaintiffs.

The jury have found this plea against the defendant, and we see no reason to question their verdict.

4. That the alleged defamatory matter in the declaration complained of is true in substance and in fact.

This was a question for the jury. In one sense it was true, namely, as to the price at which the rod itself could be furnished, exclusive of the cost of putting it up, but including that expense it was not true. It was, therefore, for them to say whether, published as it was, it was true or not, and by their verdict in favour of the plaintiffs they have found it was not true. We do not question the correctness of the opinion formed by them. It is clear from the evidence that the motive which induced the defendant to make the publication was to injure the plaintiffs' business, in consequence of a difficulty that had arisen between them and the defendant's brother.

The fifth and sixth pleas are pleaded to the first and second counts respectively, and aver that the defendant can, as stated in the publication complained of, furnish the rods at from 7c. to 10c. or $12\frac{1}{2}$ c. as good as those for which the plaintiffs charge from 37c. to $42\frac{1}{2}$ c. These pleas were proved, so far as the mere cost of the rod was concerned, but were not true if the publication was intended to convey the meaning that the defendant could furnish the rod and erect it in the same manner as the plaintiffs did for the price named. This was a question for the jury, and they have found for the plaintiffs. We see no reason for disturbing this finding.

The seventh plea, to so much of the whole declaration as alleges that the defendant meant that the plaintiffs were charging and obtaining grossly exorbitant prices for their rods, is that the charge is true. The jury have found this, also, against the defendant.

The objection taken at the trial, which is referred to by the learned Judge in his charge, and on which leave to move was reserved, is set out in the rule as follows: "On the ground that upon the pleadings and evidence no libel and no special damage was proved for which the plaintiff can sustain an action," or to arrest the judgment for the same reason. In setting out the pleas I have noted the impression made on our minds by the evidence, so the two questions remaining are as to the publications being libels, and the amount of damages.

The declaration contains two counts, as has been already mentioned, and there are two distinct libels, but as the libellous statement is the same in both, it is unnecessary to consider them separately. There is no allegation in the libel complained of that the rod sold and manufactured by the plaintiffs is of an inferior description, so there is no slander of the article itself, but what is complained of is, that the defendant states "he can furnish the same rod, and even better, from seven to ten cents per foot (for which the plaintiffs were charging from thirty-seven to forty-two and a half cents per foot) and that having a thorough knowledge of the lightning rod business, he *feels it an imposition practised on the part of the plaintiffs on the public, when they can be sold at the above mentioned low prices*," imputing thereby to the plaintiffs that that they were guilty of imposing on the public by charging an exorbitant price, while he the defendant could supply the same, or an equally good article, for much less.

If such a statement had been true, and if the defendant could have furnished the same article in the same manner as the plaintiffs did for the price he mentions, we should have been of opinion the plaintiffs had no ground of action; but when the evidence proved, and the jury have found, that such a statement was untrue, we think the action may be maintained.

In *Western Manures Co. v. Lawes Chemical Manure Co.*, L. R. 9 Ex. 218, which was an action for disparaging the goods of the plaintiff, the Court held the action sustainable,

not because the defendants had disparaged the goods, but because the declaration contained an allegation "that the said artificial manures so manufactured, sold, and traded in by the plaintiffs were artificial manures of an inferior quality to the said artificial manures, and especially were of an inferior quality to the said artificial manures of the defendants; whereas, in truth and fact, the said artificial manures so manufactured, sold, and traded in by the plaintiffs were not of an inferior quality, and especially were not inferior in quality to the said artificial manures of the defendants." In the present case the defendant has alleged that he can furnish rods at the prices mentioned by him, which, as already pointed out, is untrue in the sense conveyed by the article, and in consequence the plaintiffs have been unable to sell theirs, it being charged that they have been guilty of an imposition practised on the public.

It is hardly possible to conceive a publication better calculated to injure the plaintiffs in their trade than the one in question. It sets out that the defendant, "having a thorough knowledge of the lightning rod business feels it to be an imposition practised on the part of the plaintiffs on the public when the rods can be sold at the above low prices," having previously announced that the plaintiffs were charging from 37c. to 42½c. for rods that could be furnished by him for from 7c. to 10c.

There can be no doubt if this statement was intended to induce the public to believe that the defendant could perform the same service, (that is, could not only provide the rod but erect it in the same manner) it was untrue, and was calculated and intended to injure the plaintiffs in their business. It contains also an averment that the plaintiffs were guilty of practising an imposition on the public in so doing.

In the case already referred to, Bramwell, B., bases his judgment evidently on this principle. After stating that the allegation in the libel complained of, that the manures manufactured by the plaintiffs were of an inferior quality,

would not in itself be the subject matter of an action, he proceeds, at p. 221 : " But what makes the action maintainable is the allegation that follows : ' Whereas, in truth and in fact, the said artificial manures so manufactured and traded in by the plaintiffs were not of inferior quality, and were not inferior in quality to the said articles of manure of the defendants ' ; and by reason of the premises, certain persons, who, if they had not been told that which was untrue, would have continued to deal with the plaintiffs, are alleged to have ceased to deal with them."

In the same case, Pollock, B., says, at p. 222 : " This case, no doubt, involves first principles. On the one hand, the law is strongly against the invention or creation of any rights of action, but, on the other hand, where a wrong has actually been suffered by one person in consequence of the conduct of another, one is anxious to uphold as far as possible the maxim, '*ubi jus ibi remedium.*' "

The jury have found in the case now before us that the allegation was untrue, and that the plaintiffs have sustained damages in consequence. We therefore think that the action can be maintained.

The question of damages remains to be considered. The jury found a verdict for \$4000. On referring to the evidence we find there is no specific case in which it is shewn that a loss has been sustained. The evidence is that the agent of the plaintiffs forbore to solicit orders after the publication in the same parts of the country as they had previously occupied. John C. Schoonmaker, treasurer and general manager of defendants, says : " I do not know that I can name any particular customer that we have lost in consequence of the libel. I know the business fell off." In answer to the question " Did you ever have any of your agents driven out of any particular territory on account of the defendant's transactions ? " The answer was " Not that I ever heard of." The witness appears to be the owner of one half the stock of the company, and from his position must have been much better acquainted with their affairs than any other person. If

then he cannot refer more particularly to the loss sustained by them we think it would be unjust to allow this verdict to stand.

We therefore direct a new trial on the ground of excessive damages, on payment of costs, unless the plaintiffs consent to reduce the verdict to \$1000, in which case we direct the rule to be discharged.

Rule accordingly.

FITCH v. McCrimmon AND McLEOD.

Appropriation of payment—Partnership and individual liability—New trial—Evidence.

The defendants McC. & McL., while in partnership, purchased goods from the plaintiff. Subsequently they dissolved partnership, McC. continuing the business and taking over the assets which included a considerable portion of these goods, and thereafter McC. purchased goods from the plaintiff on his own behalf, and from time to time made payments to the plaintiff with moneys partly his own and partly the proceeds of the partnership goods. The plaintiff sued defendants for the balance due upon the goods furnished to the firm, and the question was whether the payments so made were to be applied on the individual or the partnership indebtedness. It was alleged that the evidence shewed that there was a specific appropriation to McC.'s individual account, in accordance with a stipulation between plaintiff and himself therefor, and that McL. was not only aware of such appropriation and assented thereto, but that he expressly agreed for valuable consideration to pay off the partnership indebtedness; and also that the partnership were indebted to Mc. in a sum beyond the payments made, and that McC. could therefore properly apply the payments to his own indebtedness. The payments were made in advance of the falling due of the items of McC.'s separate account, but evidence was given in explanation of this.

The jury having found for the defendants, a new trial was granted to enable the facts to be more fully considered; and *Semble*, that the plaintiff was entitled to succeed.

ACTION on the common counts.

Plea : never indebted.

The case was tried before Galt, J., and a jury, at Toronto, at the Summer Assizes of 1878.

The defendants had been partners, and had purchased goods from the plaintiff to the amount of \$442.85. After they dissolved partnership the defendant McCrimmon continued to carry on business on his own account, taking over the assets of the firm, which included a considerable part of the goods bought from the plaintiff. He made further purchases from the plaintiff, and from time to time paid him sums of money.

The only question raised at the trial was as to the appropriation of some of these payments, the defendant McLeod contending that they should be applied in payment of the balance due on the partnership debt, and the plaintiff insisting that they were applicable to the individual debt of McCrimmon.

McCrimmon said : "I notified the plaintiff of the change in the arrangements between me and McLeod. The plaintiff told me that as McLeod was the responsible party—the man of means—he could not keep me going any longer except on such orders as I should pay for. I said I wanted anything I paid to go on the new account. I continued business, and dealt with Fitch, and paid him cash. I remitted either once or twice to him. I delivered in person either once or twice ; and any balance after my goods were paid was to be applied to the old account. I continued doing business with him. Some of the goods originally ordered remained unsold to the last. The money I sent him was partly my own money, and partly the proceeds of the first order. I afterwards sold out the goodwill of the business. I made arrangements with McLeod both before and after the sale. * * He was to pay the balance of this old account. I left the counter, hot air pipes, furniture of bake-house, and a note for \$100, and he promised to pay the balance of Fitch's account."

The plaintiff said : "McCrimmon asked me if I would continue the account against him the same as the firm. I told him that I would not : that I looked upon McLeod as

the responsible man : that I did not know anything about his position, and would not give him the extended credit after McLeod was out of the firm. I told him he had better buy in ‘smalls,’ and pay cash as he went along, and pay off the old account as soon as he could. ‘Cash’ does not mean payment just on the day of the delivery of the goods.”

McCrimmon’s own purchases extended from the 28th November, 1877, to the 28th February, 1878, and amounted in all to \$251.86. On the 27th November he paid the plaintiff \$32, and on the 3rd December \$150, both of which sums were expressly appropriated upon the old account, leaving due thereon the balance now sued for. Subsequently, at different dates, beginning with the 28th December, 1877, and ending on the 27th March, 1878, he paid the plaintiff other sums, amounting in all to \$296. All these sums were, in accordance with the arrangement between them, placed to the separate credit of McCrimmon to secure his account.

Upon the invoices of the goods sold to McCrimmon, they were expressed to be sold on terms of credit, from 30 and 60 days to four months, although the agreement between McCrimmon and the plaintiff was that the dealings between them were to be on a cash basis, and not on the ordinary terms of credit. The plaintiff explained that the prices of the goods were based on the terms of credit, and that the parties paying cash got the discount. According to the terms of credit, as shewn by these invoices, there would be little or nothing due before the whole \$296 had been paid, and at one time there was more at McCrimmon’s credit than his whole purchases amounted to. It did not appear that the discount had ever been allowed him, or in fact that his accounts had ever been settled with the plaintiff. There was a balance at his credit on the new account of about \$45. There was nothing to shew how much of the \$296 was the proceeds of the goods originally ordered.

The jury found a verdict for the defendant.

In Trinity term, *J. A. Paterson*, obtained a rule *nisi* to set aside the verdict, and for a new trial, or to enter a verdict for the plaintiffs, on the grounds, that the jury should not have been told that they should not consider the dealings between the defendants: that they should have been told that there was evidence that the defendant McLeod had agreed with the defendant McCrimmon to pay the amount due the plaintiffs, and had assented to the appropriation of payments made between the plaintiff and the defendant McCrimmon: that the jury should have been told that on the evidence McCrimmon had, after the dissolution of partnership between the defendants, specifically appropriated the payments made by him to the plaintiff to discharge his own separate account with the plaintiff, and that he had a right to do so: that the jury should not have been directed that if the moneys paid by McCrimmon to the plaintiff were partnership moneys, a verdict should be given for the defendants: that it was not proved that the moneys paid by McCrimmon were partnership moneys; and because the verdict was against law and evidence, &c.

In this term, May 23, 1879, *Hector Cameron*, Q. C., shewed cause. The evidence shews that the moneys paid by the defendant McCrimmon to the plaintiff were the proceeds of the sale of the partnership goods, and therefore they must be applied in payment of the partnership indebtedness. The cases shew that where, after the dissolution, the continuing partner becomes indebted on his separate account to a creditor of the partnership, the payments made by him after the dissolution must be applied in satisfaction of the whole account, and, therefore, in accordance with the rule as to appropriation of payments, must be applied in discharge of the earlier items of the account, which here would be the partnership indebtedness: *Lyman v. Miller*, 12 U. C. R. 215; *Marryatts v. White*, 2 Stark. 101; *Thompson v. Brown*, M. & M. 40; *Smith v. Wigley*, 3 M. & S. 174. In any event the appropriation must be to the old account, because there was nothing due to the plaintiff on the defendant McCrimmon's separate account when the money was paid.

J. A. Paterson, contra. The cases referred to by the other side only apply where there is no specific appropriation at the time of payment. Here the partnership accounts and McCrimmon's separate account were kept separate, and there was a specific appropriation to the separate account. The plaintiff only allowed McCrimmon to have the goods obtained after the dissolution on the express stipulation that the moneys were to be so appropriated, and there was nothing to prevent such stipulation being made. The evidence also shews that McLeod assented to the appropriation being so made; and that he agreed, in consideration of his getting from McCrimmon the note for \$100, and the partnership property left by McCrimmon, to assume the partnership indebtedness. Moreover, the evidence shews that the firm was indebted to McCrimmon in the sum of \$320, and McCrimmon could therefore properly apply the partnership funds to that extent in payment of his personal indebtedness. There was, however, no evidence to shew that the moneys were the partnership moneys. Under these circumstances, the verdict should be entered for the plaintiff; at all events there should be a new trial.

June 27, 1879. OSLER, J.—I think the plaintiff is entitled to succeed. The money which the defendant McLeod now seeks to have applied in payment of the balance due upon the partnership account of McCrimmon & McLeod, was by the express agreement of McCrimmon and the plaintiff appropriated to the separate account of McCrimmon alone.

Apart from the question whether these moneys were the proceeds of the partnership property, and for this reason necessarily to be applied in satisfaction of the partnership debt, the specific appropriation thus made takes the present case out of the operation of *Thompson v. Brown*, M. & M. 40, and *Smith v. Wigley*, 3 M. & S. 174.

In the former it was held that if a partner was indebted on his own account to a person to whom the firm was also

indebted, and that [partner with the moneys of the firm made a payment to the creditor without specifying the account on which it was paid, the payment must be taken to have been made on the partnership account, and applied accordingly.

So in *Smith v. Wigley*, where two persons had been in partnership and one of them after the dissolution became indebted on his own separate account to a creditor of the partnership, it was held that in absence of any specific appropriation payments made by him after the dissolution should be applied in reduction of the entire account, and consequently must discharge the earlier items.

To the same effect is *Simson v. Ingham*, 2 B. & C. 65, where there was no specific appropriation.

Here the accounts were kept separate and distinct, and so far as the intention of the parties is evidenced by their acts and expressions there was a specific appropriation of the moneys in question.

I find no authority for the contention that this appropriation could not be validly made, because there was nothing actually due from the defendant McCrimmon on his separate account at the time he paid the money; and that for this reason the money so paid must necessarily be taken to have been applied upon the partnership debt. I think there was nothing to prevent McCrimmon and the plaintiff from stipulating that everything should be placed to the separate credit of the former to secure his private account.

There remains the question whether, notwithstanding the specific appropriation thus made by McCrimmon, the defendant McLeod is entitled to insist that the money shall be applied in liquidation of the partnership debt, because it was in fact the money or property of the partnership.

The evidence as to this is very meagre. No doubt it may be inferred that part of the money was derived from the sale of what had been the partnership property, but it is not shewn how much. All that the defendant Mc-

Crimmon says is, that the money he sent was partly his own and partly the proceeds of the first order ; and looking at the circumstances under which the dissolution took place, and the fact that McCrimmon seems to have continued the business on his own account with the assent of Macleod, apparently making no distinction between the stock which remained at the time of the dissolution and the new stock which he purchased afterwards, I should be prepared to hold, in the absence of express notice to the plaintiff, that even if the moneys which were thus appropriated were the funds of the partnership they could not now be reached by the defendant MacLeod. No doubt one partner cannot pay his private debt with the moneys of the firm without the assent of his co-partners express or implied. There is here evidence of express assent by MacLeod to what McCrimmon had done, and of an agreement on his part for consideration to pay or assume the balance of the partnership debt.

But, apart from this, I also think that there is evidence from which assent may fairly be implied. It is not as if after the dissolution the partnership assets were being administered and the estate wound up in the regular way. Here one partner takes over all the assets with the knowledge and assent of his co-partner, and continues the business formerly carried on by the co-partners. There may, in such case, be an implied undertaking to indemnify the retiring partner against the debts of the firm ; but can the rule just referred to be applied against a creditor in the position of the plaintiff ? I think it has no application to such a state of things.

For these reasons I think the rule should be made absolute for a new trial. See *Kendal v. Wood*, L. R. 6 Ex. 243.

WILSON, C. J.—I shall only say that, while admitting the perfect accuracy of the direction of my brother Galt to the jury in this case as applicable to ordinary cases of partnership, and to the dealings with the partnership property

after dissolution of the firm, when the creditor has notice that the fund from which the separate debt of the partner is paid is partnership assets; there are circumstances in this case between the defendants as partners which have not, in my opinion, been sufficiently considered, and that there should therefore be a new trial.

I have examined the case with a good deal of care, and it will be found that the payments made by McCrimmon were not only in advance of the falling due of the items of McCrimmon's separate account; but were, until the payment of \$50 on the 30th of January, 1878, largely in advance of the falling due of any of the items of the partnership account, and that when the payment of that date, the 30th of January, 1878, was made there was a sum of \$74.37 of the separate account of McCrimmon also due.

There was from the evidence a debt due by the firm to McCrimmon of \$320 before any of these payments were made, as sworn to and not disputed, and there is no reason why McCrimmon should not apply that amount of the partnership means in paying his personal debts.

There is reason also to infer that McLeod knew of all and sanctioned all that McCrimmon was doing in the partnership as well as in his own separate business. And it was sworn to and not denied that McLeod for a valuable consideration expressly agreed to pay the balance now claimed in this action, thereby ratifying and adopting all that McCrimmon had hitherto done.

A good deal also was said of the manner in which the plaintiff's accounts were kept: that is by his making sales at *four months* and at *sixty days*, according to the nature of the goods sold, and applying the payments made to items the credit for which had not upon these terms expired, as if they were due when the payments were made. But that was, I think, explained, and there is nothing inconsistent in selling upon such terms, giving the purchaser the right to pay before maturity and to claim the cash price of the goods, for the payments so made within certain dates, or a deduction of some kind if the payment

were beyond the cash dates. And as a fact the payments, as I have stated, having been made in advance of there being anything due on either account, is evidence that the parties did agree to deal together just in that way. The very first sale on the 27th of September, 1877, of \$295.40 was, as McCrimmon's letter of October of that year produced at the trial shewed, a transaction of that kind.

There are several questions which the jury should be asked, such as the following, and any others which the parties may desire to have put to them:—

1. Was the money paid by McCrimmon to the plaintiff the partnership money, or was part of it only partnership money, and if so, what part?
2. If any of it was partnership money, did the plaintiff know it to be so?
3. Did McLeod know that McCrimmon was to buy, and that he did buy, goods of his own to enable him to carry on the old business for the purpose of being able to sell off the stock belonging to it?
4. Did McLeod assent to such an arrangement?
5. Did McLeod give up the goods to McCrimmon to do with them as he, in his judgment, might think best?
6. Did McCrimmon, while he carried on the business until he sold it out entirely in May, 1878, do the best he could for the partnership?
7. Was McCrimmon a creditor of the firm to the amount of \$320, or to any other and what amount at the time he made these payments?
8. Was McLeod a debtor to the firm for the promissory note of \$100 and the other articles of property of the firm said to have been given to him by McCrimmon?
9. Did McLeod, in consideration of getting the note and the articles just mentioned, promise McCrimmon to pay the balance of account which is now claimed by the plaintiff?
10. Did the plaintiff and McCrimmon agree to the payments made being applied as the plaintiff applied them?

With the information which answers to these or the like questions will give us we shall be able to apply the law to

the particular circumstances of this case, which we are not now able to do.

In my opinion the rule should be made absolute for a new trial, without costs.

GALT, J.—I agree with the Chief Justice in thinking there should be a new trial in this case, without costs, on the ground that the defendant McLeod did not tender himself as a witness to explain the transaction between McCrimmon and himself, by which, according to the evidence of the former, McLeod expressly agreed to assume the payment of the debt now claimed by the plaintiff. Unless he can do so satisfactorily I agree with my learned brothers that he should be held to have ratified and confirmed the arrangement made between McCrimmon and the plaintiff when the new account was opened.

The rule will be absolute for a new trial, without costs.

Rule absolute.

MEMORANDA.

During this term the following gentlemen were called to the Bar :—

THOMAS STINSON JARVIS, THOMAS TAYLOR ROLPH, LOUIS ADOLPHE OLIVIER, MALCOLM GRÆME CAMERON, GEORGE EDGAR MILLAR, NICHOLAS DUBOIS BECK, WALTER J. BREAKENRIDGE READ, EMERSON COATSWORTH, JR., JOHN MORROW, JAMES CARMAN ROSS, ALPHONSE BASIL KLEIN, EDWARD GEORGE PONTON.

SITTINGS IN VACATION

AFTER EASTER TERM, 1879.

IN RE VASHON AND THE CORPORATION OF THE TOWNSHIP
OF EAST HAWKESBURY.

Municipal corporations—By-law closing up road—Application to quash—Notice—Proof of by-law—Private way—Compensation — Right of councillor interested to vote.

On an application to quash a by-law closing up a road, the applicant's affidavit stated that in compliance with his request therefor he received from the township clerk what purported to be a copy of the by-law with the following certificate thereon: "Verified a true copy," which was signed by the clerk and under the corporate seal, but the by-law was not stated to have been signed by the reeve or other proper officer, or to be under the corporate seal.

Held, by OSLER, J., that this was sufficient proof of the by-law under sec. 322 of the Municipal Act, it not being essential to shew that the by-law was signed by the reeve, &c., under the corporate seal, and that if the corporation intended to rely on this objection the onus was upon them to substantiate it.

Held, also that it was not open to the applicant to object that the road in question was a private way over one C.'s land, because the applicant himself had treated it as a public highway, and had caused C. to be convicted several times for obstructing it.

Held, also, that the evidence, set out below, shewed that the applicant had due notice of the intention to pass the by-law.

Held, also, following *McArthur and Corporation of Southwold*, 3 App. 298, that the deprivation of the use of the road by the applicant, if the by-law had that effect, was a subject for compensation only, which need not be provided for in the by-law.

It appeared that the only persons interested in the maintenance or closing of the road were the applicant and C. who was instrumental in having it passed. The township council consisted of five members of whom C. was one, the concurrent votes of three of whom was necessary to the passage of a by-law. The by-law here received three votes, including C.'s.

Held, that the by-law could not be upheld, for that C.'s interest in its passage, which was apart from that of the public, disentitled him from voting.

Held, also, that it was objectionable as being passed to serve private interests, and not *bona fide* in the interests of the public.

ON the 26th February, 1878, *M. C. Cameron*, Q. C., on behalf of the applicant, obtained from Gwynne, J., sitting for the full Court, a rule calling upon the township to shew cause why by-law No. 188, passed on the 3rd of December, 1877, to stop up and close the road on lot No. 5 in the Gore of the 9th concession, should not be quashed with costs, on the grounds :

1. That no notice as required by law was given of the intention of the council to pass the by-law.
2. That the notice of such intention was not signed or given by the clerk of the corporation as required by law.
3. That there was no applicant for the passage of the by-law as required by law.
4. That at the time the by-law was passed a resolution of the council postponing the consideration of the petition of one Benjamin Cardinal to that effect for a period of six months had not been rescinded, and the said period had not elapsed.
5. That the by-law was not properly passed by the council or by the majority of the whole number of members thereof required by law to constitute the said council.
6. That the necessary number of votes required to pass the said by-law was not given by members of the said council qualified to vote therefor.
7. That the said Vashon is in consequence of such by-law excluded from ingress to and from his land and place of residence over such road, and the by-law does not provide any compensation to the said Vashon for closing said road, or some other convenient road or way of access to his said land and residence.
8. That the road having been opened, constructed, and contributed by private persons for the benefit and accommodation of the lands abutting thereon and an easement appurtenant thereto, the council had no authority to stop it up or close it, and the by-law was *ultra vires*.
9. That the council in passing the by-law acted in violation of the trust reposed in them, and contrary to fair dealing and justice.

There were other objections to which it is unnecessary to refer.

The rule was granted on an affidavit of the attorney for the applicant, who stated that on behalf of the applicant he applied to M. Maneely, the clerk of the township of East Hawkesbury, for a certified copy of by-law No. 188 of the township, for stopping up a road in lot No. 5 in the Gore of the 9th concession, and that in compliance with his application he received the paper marked "A" annexed to the affidavit from the said clerk on the 13th day of January, 1878, which paper purported to be a certified copy, and which the deponent verily believed to be a true and certified copy thereof.

The paper was as follows:

"By-law No. 188 for stopping up and closing the road on lot No. 5, in the Gore of the ninth concession of East Hawkesbury.

" Passed 3rd of December, 1877.

"The Municipal Council of the township of East Hawkesbury in meeting assembled, doth ordain and enact, and it is hereby ordained and enacted, that the road on lot No. 5, on the Gore of the ninth concession, be from henceforward closed.

" Verified: A true copy.

" M. MANEELY,

" Township Clerk.

" Made at East Hawkesbury, this 17th day of January, 1878."

[Township Seal.]

The applicant's case was that, the road in question had been laid out upon lot No. 5 upwards of 34 years ago, by agreement between the owners of lots 4 and 5 in the Gore of the 9th concession, and ran from the front to the rear of lot 5, along the line between lots 4 and 5: that it was in the first instance intended as a private road for the convenience of the owners of those lots, there being then no other road extending from the road allowance between the 8th and 9th concessions of the Gore to the boundary line

between Prescott and Glengary: that ever since the road was laid out it had been kept up and used by the owners of the lots and by the public as a public road, until recently obstructed by one Benjamin Cardinal, the present owner of lot No. 5: that the applicant resided about the centre of lot No. 4, and the road was indispensable to him, and, if stopped up, the value of his farm would be reduced, and he and the public would, when desiring to go to the west, be obliged to make a detour of four miles: that Cardinal had for some time past been obstructing the road so as to prevent the applicant from using it, and had been two or three times convicted and fined for doing so.

As to the closing of the road, the applicant said, that in the latter part of November he saw a notice in a newspaper that the council intended at their meeting on the 3rd of December to pass a by-law to stop up the road. The notice was signed by Simon Labrosse, Reeve; Benjamin Cardinal, Councillor, and James Wyllie, Deputy Reeve: that he appeared before the council and opposed the by-law, and presented three petitions against it: that he was informed by the Reeve that at the time the notice referred to was given there was no petition for the By-law, though one in support of it was put in before it was passed: that the clerk of the council stated that he did not issue or give the notice referred to, and that he had first seen it in the newspaper: that at the meeting of the 3rd December, a resolution was rescinded which had been passed on the 9th of August previously, to adjourn for six months the consideration of an application to stop up the road: that the resolution was rescinded, and the by-law passed by the votes of the Reeve, Deputy-Reeve, and Cardinal; one member of the council voting against it, and one declining to vote at all. The applicant and a member of the council objected to Cardinal's voting, on the ground of his personal interest in the matter.

Extracts from the minute book of the council shewed that on the 27th August, 1877, a resolution was passed "That the petition of the undermentioned parties be left

over for six months, namely, Mr. Benjamin Cardinal for closing a road on lot 5 ;” and on the 3rd December, 1877, another resolution was moved by Mr. James Wyllie, seconded by Benjamin Cardinal, and passed, “That the resolution passed on the 27th August, 1877, adjourning the petition of Benjamin Cardinal and others for six months, be rescinded.”

There was a petition against closing the road, signed by 115 ratepayers. It contained a statement that the road had been maintained by public aid without one cent from the council, and not one day of statute labour upon any part of the road.

The petition for the passage of the by-law was addressed to the meeting of the 3rd December, 1877, and stated that the road was a great inconvenience to the people owning the land, that is lot 5 ; and that in the opinion of the petitioners the road, though in use by some persons, might be dispensed with as there was no person or property which required it as an outlet.

The affidavit of Simon Labrosse, reeve of the township, and of Benjamin Cardinal, were filed in opposition to the rule. The former stated that the title to lot No. 5 was still in the Crown, the patent not yet having been taken out : that lots 4, 3, and 2 abutted upon the allowance for road between the 8th and 9th concessions of the Gore, to which allowance the owners of all these lots had access over their own land and along which they could reach public highways on the east and west of the road in question, running parallel thereto, one mile distant on the west, and one-half of a mile on the east. It was denied that the road had been kept open as a public road. It was shewn that Vashon had always contended that it was a public highway, and had caused Cardinal to be convicted three times for obstructing it.

Labrosse stated that it having been made to appear by the oaths of Vashon and others (in the proceedings before the magistrates) that the road was a public highway, the said Cardinal, “ who was and is a councillor for the town-

ship, applied to have a by-law passed to stop up the same." This was in July, 1877, and notice of intention to pass the by-law appeared to have been duly published and posted up, as required by law, previous to the meeting of council on 27th August; on which day Vashon appeared and was heard against the by-law, and its consideration was postponed for six months; "but the said Vashon having soon afterwards, viz., on 17th September, caused the said Cardinal to be again prosecuted, convicted, and fined for obstructing the said road, the said Cardinal applied to me as reeve to call a meeting of the council, and proceed with the consideration of the by-law": that thereupon the notice referred to in the affidavit of Vashon was published and posted up, as required by law, for more than a month before the meeting of the 3rd of December. On the said 3rd of December the said Vashon and all persons opposed to the passing of the by-law having attended and been heard, a majority of the council, considering that it had been proved that the road was a highway, and considering that it had almost ceased to be used by the public, and that other roads afforded every reasonable accommodation to the public, proceeded to rescind the resolution of the 27th August, and passed a by-law closing up the road, which by-law was carried by the votes of the said Cardinal, and of James Wylie, deputy-reeve, and of deponent, councillor McClintock voting against it, and councillor Conway declining to vote.

The affidavit of Cardinal was to much the same effect. He said that he applied for the passing of by-law 188, closing up a public highway passing along and over lot No. 5, and did so because Vashon had him convicted and fined several times for obstructing the road.

On June 24th, 1879, *Robinson*, Q. C., shewed cause.

McMichael, Q. C., contra.

The arguments and cases cited sufficiently appear from the judgment.

June 30, 1879. OSLER, J.—It was contended by Mr. Robinson that the applicant had not complied with the requirements of sec. 322 of the Municipal Act as to proof of the by-law, as it did not appear from the copy produced that the by-law moved against had ever been signed by the reeve or other head officer, or was under the seal of the corporation (sec. 281), and that the words “verified a true copy” were not a sufficient certificate that the document was a true copy of the by-law in question, or of any by-law. Leave was asked by the applicant to put in an amended certificate and copy of by-law, if necessary.

I do not think that the case of *Buchart v. Municipality of Brant*, 6 C. P. 130, or the other cases referred to by Mr. Robinson on this point, are decisive in favour of this objection.

In *Buchart v. Municipality of Brant*, the seal of the corporation was not affixed to the clerk's certificate, and the by-law was not authenticated in the only other way permitted by the statute, viz., by a copy written without erasure or interlineation, sealed with the seal of the corporation, and certified to be a true copy by the clerk, and by any member of the Council: R. S. O. ch. 174, sec. 282.

Draper, C. J., in referring to the defect in this last mode of proof, says, at p. 133: “There is no direct evidence that the original by-law was sealed; there is only a representation of a seal, indicating that the seal was attached to the original: *sufficient* if the certificate had been in conformity with the statute; but without that, not by itself sufficient to prove that the original by-law was sealed.”

I am inclined to agree with Dr. McMichael that it is not necessary that the signature of the reeve and clerk and the seal should be copied or indicated in the copy of the by-law produced to the Court. On its face the document purports to be a copy of a by-law, and of the by-law moved against, and it is sworn to have been delivered by the clerk of the township to the applicant's solicitor as a copy of that by-law.

There is, moreover, authority against this objection.

In *Re Croft and Municipality of Brooke*, 17 U. C. R. 269, it is plain that the copy of the by-law produced did not shew that the original was sealed. The rule was discharged, not on that ground, but upon affidavits shewing that in fact it was not and never had been sealed.

In *Scott and Corporation of Harvey*, 26 U. C. R. 32, it is expressly said there was no other evidence of any seal being attached to the by-law than the certificate of the township clerk under the seal of the township, certifying the document to be a true copy of the by-law. The precise objection was taken that there was no evidence that the by-law was sealed, but no effect was given to it.

Baker v. Municipal Council of Paris, 10 U. C. R. 621, and *Kinghorn and Corporation of Kingston*, 26 U. C. R. 130, shew (1) that the seal of the corporation need not be mentioned in the clerk's certificate; and (2) that no formal certificate is necessary. The words, "a true copy" with the signature of the clerk and his title of office, were held sufficient in the latter case.

In short, as regards this objection, I think it rests upon the corporation to make it good by shewing that what is now described as a by-law never was a by-law at all, because it was not sealed or signed as the statute requires.

Mr. Labrosse, the reeve of the township, says that he has examined the copy of the by-law produced, and speaking from his said examination the said copy is not a copy (he does not say in what respect) of the by-law passed for closing up the road. His reticence is very suggestive.

An additional answer to Mr. Robinson's objection is, that if the instrument is not a by-law it is an order or resolution of the council, and, as such, may be moved against though not under seal.

I proceed to deal with the application on the merits.

As the by-law is not on its face illegal, I would not interfere on the objection that the road which it professes to close is a private road or right of way over Cardinal's farm. The applicant has procured Cardinal to be con-

victed several times for obstructing it as a public highway, and it does not lie in his mouth, when the corporation have taken him at his word, and attempted to close the road as being a public one, to say that their by-law is bad because the road is a private one.

I do not of course mean to say that his private right of way is or can be at all affected by the by-law.

Neither would I give effect to any objections based on the ground of want of notice or due publication of the intention of the council to pass the by-law. The applicant suppresses all mention of the notices published before the meeting of council of 27th of August, 1877, when the petition for closing the road was adjourned for six months, and he had in fact actual notice of the special meeting of the 3rd of December, 1877, and appeared thereat and opposed the passing of the by-law : *Scarlett v. Corporation of York*, 14 C. P. 161 ; *McKinnon and Corporation of Caledonia*, 33 U. C. R. 502 ; *Baker and Corporation of Saltfleet*, 31 U. C. R. 386.

As to the 7th objection, the facts are brought within the case of *McArthur and Corporation of Southwold*, 3 App. 295, 298, and the deprivation of the applicant of the use of this road, if the by-law has that effect, is a subject for compensation only, which need not be provided for in the by-law by which the road is closed.

On the fifth, sixth, and ninth objections I think the applicant is entitled to prevail.

It appears very plainly from the affidavits filed on both sides that Vashon and Cardinal are the persons who are really interested in the maintenance or closing of the road in question. The public take no part in it, except in the interest of one or the other of them, as may be seen from the petitions presented for and against the by-law.

Cardinal, on whose lot the road is established, has obstructed it several times, and has as often been fined for doing so. It at last occurred to him that his remedy was in his own hands, and he petitioned the township council, of which body he was a member, to pass a by-law to close the road. At his instance, and for his sole benefit, the by-

law was introduced and passed. The council consists of five members, and by secs. 226, 227, R. S. O. ch. 174, the concurrent votes of at least three members are necessary to carry out any resolution or other measure: *Mallough v. Municipality of Ashfield*, 6 C. P. 158. In the present case one member of the council voted against the by-law, one refrained from voting or taking any part in the matter, and three, viz., the reeve, deputy reeve, and Cardinal voted for the by-law. It was therefore passed by the vote of Cardinal himself.

I am clearly of opinion that a by-law thus passed cannot be upheld. Cardinal was both judge and party in the matter, inconsistent positions, both of which it was impossible that he should fill.

It is not necessary that I should elaborate this proposition in reference to the case now in judgment. It is enough to refer to the *City of Toronto v. Bowes*, 4 Grant 489, 504, *et seq.*, and in Appeal, 6 Grant 1. *Baird and Corporation of Almonte*, 41 U. C. R. 415, was decided upon sec. 73 of the Municipal Act; but it is plain that the learned Chief Justice felt that the by-law could not have been upheld, apart from the statute.

Such a case as the present is quite distinguishable from one where the motives merely of the member of the council are in question, or where, though he is personally interested, his interest is not different from that of the community in general, *e. g.*, the imposition of a tax rate: *Borough of Freeport v. Marks*, 59 Penn. 253, 257; *Steckert v. City of East Saginaw*, 22 Mich. 104, 112.

I think the by-law is also objectionable, on the ground that it was passed to serve private interests, and not *bond fide* in the interest of the public. See *Burritt and Corporation of Marlborough*, 29 U. C. R. 119-131; *Webster and Corporation of West Flamborough*, 35 U. C. R. 590; *Regina v. Milledge*, L. R. 4 Q. B. D. 332.

The rule will be absolute to quash the by-law, with costs.

Rule absolute.

HALL v. LANNIN.

Insolvency—Dissolution of partnership—Proof of claim of retiring partner—Equitable debt.

Upon the dissolution of a partnership between W. and McC., it was agreed that all the partnership property and assets should be vested in W., who was to collect all the debts and pay the liabilities of the firm, and that an account was to be taken of the co-partnership business to ascertain the respective shares or interest of the partners therein, or the amount payable by either to the other, W. to be charged with the value of the assets and to be credited with the liabilities, and all that remained to be done was to ascertain by taking an account of the indebtedness existing between them. McC. then carried on business on his own behalf, and becoming insolvent, made an assignment to the plaintiff as assignee in insolvency. It was claimed that upon taking accounts between McC. and W., a balance would be found due to W., for which he was entitled to rank upon McC.'s estate.

Held, that W.'s claim was an equitable debt, capable of being ascertained by the Court, and for which therefore he was entitled to so rank on McC.'s estate.

THIS was a special case submitted by an arbitrator, to whom the matters in the cause between the parties were referred by an order of R. G. Dalton, Esq., Q.C., Clerk of the Crown and Pleas, Queen's Bench, sitting in Chambers.

The order provided that the arbitrator might if he saw fit, and should if required by either of the parties, state a case for the opinion of the Court upon any matter of law arising upon or out of the reference.

The arbitrator, at the request of the parties, postponed the taking of the accounts between them and the making of his award until after the determination of the question of law hereinafter submitted and stated, and found the following facts for the opinion of the Court of Common Pleas.

1. On the 1st May, 1869, Samuel White and William McCullagh entered into articles of co-partnership, agreeing to become partners in the business of manufacturing and trading in boots and shoes, for the term of five years, computed from the 25th February preceding; and the said articles of co-partnership provided, amongst other things, that upon the determination of the said partnership, either

upon the expiration of the said term or otherwise, the stock, books, implements, tools, material, furniture and other partnership property accumulated during and at the expense of the said firm, or for the said firm, should be divided between the said partners in proportion to the amount of capital appearing by the then last taking of stock to have been contributed by the said parties respectively, less what might have been withdrawn by them in the meantime.

2. The said Samuel White and William McCullagh, under the said articles of co-partnership, carried on business from the said 25th February, 1869, up to the 1st January, 1872, when by mutual consent they dissolved their co-partnership.

3. Upon such dissolution it was agreed that all the property and assets of the said co-partnership should become vested in the said Samuel White solely, and that he should collect all the debts due to the said firm, and pay all the liabilities thereof; and that an account should be taken of the said co-partnership business, with a view to ascertaining their respective shares or interest therein, or the amount payable by either to the other, the said Samuel White to be charged in such account with the value of the property and assets of the said firm so to become vested in him, and to be credited with the amount of the liabilities of the said firm so to be assumed by him. Pursuant to which the said William McCullagh conveyed to the said Samuel White all his interest in the property and assets of the said firm, and gave a power of attorney to the said Samuel White to collect and get in the amounts due to the said firm; and the said Samuel White covenanted to indemnify the said William McCullagh in respect of his liability on account of the liabilities of the said firm, and discharged all the liabilities of the said firm.

4. Thereafter the said William McCullagh became a trader on his own account, and as such became insolvent and made an assignment under the Insolvent Act of 1875, of his estate and effects to the plaintiff, who was afterwards appointed assignee by the creditors.

5. In the said insolvency proceedings the said William McCullagh entered into a composition with his creditors, one half of which was to be secured by the bond of the defendant, which composition was accepted by the creditors, and such bond was thereupon given by the defendant to the plaintiff, which is the bond sued on herein, the breach alleged being the non-payment of the composition in respect of the claim of the said Samuel White hereinafter mentioned.

6. Upon the taking of such account as aforesaid, before the insolvency of the said William McCullagh, the said Samuel White claims that a balance was found to be due from the said William McCullagh to the said Samuel White, in respect of which the said Samuel White claims to rank upon the estate of the said William McCullagh.

7. The taking of the accounts referred to was merely a making up of accounts by an accountant for the said White, not in presence of the said McCullagh, and not admitted by the said McCullagh to be correct.

8. There never was any settlement of accounts between the said White and the said McCullagh, nor was any balance ever admitted by the said McCullagh to be due from him to the said White.

The question for the opinion of the Court upon the above state of facts is, whether or not, under the provisions of the Insolvent Act of 1875 and amendments thereto, the said Samuel White is entitled to rank upon the said estate of the said William McCullagh for the amount of his claim in respect of the balance which he alleges to be due to him from the said William McCullagh upon the taking of the said partnership accounts as aforesaid,

June 10, 1879. *Watson*, for plaintiff. The plaintiff is entitled to rank upon the estate. Here the partnership has been determined, and the partnership debts paid, and all that remains is to take an account to ascertain the amount due to plaintiff. This is a debt or money demand under the Administration of Justice Act, R. S. O. ch. 49, sec. 4, for which an action

at law may be maintained. The cases shew that an equitable demand is the subject of an action at law, and a creditor under the Insolvent Act includes one entitled to maintain such an action: *Add. on Contracts*, 7th ed., 990; *Clarke's Insolvent Acts*, 227; *Re Prescott*, 9 B. R. 385; *Ex parte Waters*, L. R. 8 Ch. 562; *Robson on Bankruptcy*, 3rd ed., 241, 676; *Want v. Reece*, 1 Bing. 18; *Leighton v. Wales*, 3 M. & W. 545; *Barker v. Allan*, 5 H. & N. 61; *Lindley on Partnership*, 4th ed., vol. ii., p. 1027-32; *St. Michael's College v. Merrick*, 1 App. 556-7.

J. K. Kerr, Q. C., contra. There is no right to prove here. There has been no settlement of accounts, and therefore no debt has been ascertained which can be proved for. The Adminstration of Justice Act cannot assist the plaintiff: *Insolvent Act of 1875*, sec. 80; *Edgar's Insolvent Act*, 107; *Re Randolph*, noted in 13 L. J. N. S. 83; *Ex parte Maude*, L. R. 2 Ch. 550; *Kintrea v. Charles*, 12 Grant 117; *Gray v. McMillan*, 22 U. C. R. 456; *Ex parte Gray*, 2 M. & A. 283, 286; *Ex parte Notley*, 1 M. & A. 46.

June 24, 1879. OSLER, J.—The action, as appears by the special case, is upon a bond given by the defendant to the plaintiff as assignee, under the Insolvent Act, of William McCullagh, an insolvent, to secure payment of the composition agreed to be paid by McCullagh to his creditors, and the breach alleged is the non-payment of the composition in respect of the claim of Samuel White.

The defendant contends that Samuel White is not a creditor of the insolvent; at all events, not for a claim provable in insolvency.

It is not stated whether White did in fact prove the claim in question in this action in the proceedings in McCullagh's insolvency. If he did, and the claim was not contested, it may be found that the defendant is not in a position to dispute the status of White as a creditor, and that the answer which may be given to the question submitted will not be decisive of his liability, even if it should

be in his favour: Insolvent Act of 1875, secs. 95, 104; *Rooney v. Lyons*, 2 App. 53.

Section 2 (h) defines "a creditor" under the Act as "every person, co-partnership or company to whom the insolvent is *liable*, whether primarily or secondarily, and whether as principal or surety."

Section 80 declares that: "All debts due and payable by the insolvent at the time of the execution of a deed of assignment, or of the issue of a writ of attachment under this Act, and all debts due but not then actually payable, * * shall have the right to rank upon the estate of the insolvent."

An equitable debt might always be proved in bankruptcy under the English Acts, though it would not support a petition for adjudication before the Act of 1869.

Ex parte Gray, 2 M. & A. 283, shews that if an account is necessary to liquidate a demand, a petition would not lie on such demand; and for this reason a partner of the debtor could not be a petitioning creditor against him, unless in cases where he might maintain an action for the amount of the debt.

In *Ex parte Nokes*, 1 M. & A. 47, note, it was held that one of the partners of a firm could petition against his co-partner if his debt had not arisen out of the partnership, but otherwise not, unless upon an account settled.

In this case, however, Lord Eldon says: "Had the partnership been determined, and had the solvent partner paid all debts, I should think that he might sustain the commission."

The general rule is, that it is objectionable to found a petition for adjudication upon a disputed balance of a complicated diversity of cross demands and unsettled accounts: *Re Scott Russell*, 31 L. J. N. S. Bkcy. 37.

The language of the United States Bankruptcy Act, section 5067, referring to *debts* which may be proved, is nearly *verbatim* the same as section 80 of our own Act. And in the case of *Sigsby v. Willis*, 3 B. R. 207, it was held that an indebtedness growing out of partnership

transactions, of which no settlement had been made between the parties, in a case where *the partnership debts had not all been paid, nor all the partnership property disposed of, and being in part for assets that had never been disposed of*, was not a provable debt.

The clauses of the Administration of Justice Act, upon which the plaintiff relies will not be found to be of much importance to him on such a question as this. They do not at all enlarge the jurisdiction in insolvency or make those claims provable there which were not so before. They are intended to prevent an injustice being done to the litigant who finds that he has applied to the wrong forum for relief, and enable him to have his action transferred from one to the other according as it may be dealt with more conveniently and with greater justice to the parties in a Court of law or a Court of equity.

Nor is it easy to see how the right of one partner to recover what may be found due to him on winding up the partnership, can be called a "purely money demand," when the partnership assets have not been realized, and the partnership liabilities have not been paid.

When, however, all this has been done, and there remains but the matter of ascertaining upon the state of accounts and the agreement, if any, between the parties how much is due from one partner to the other, the action might well lie between them at law, being for a purely money demand.

In the case before me Messrs. White & McCullagh, after the dissolution of their partnership, agreed that the former should take all the property and assets of the firm solely, and should collect all the debts and pay all the liabilities, and that an account should be taken of the co-partnership business with a view of ascertaining their respective shares or interest therein, or the amount payable by either party to the other, White to be charged in such account with the value of the property and assets, and to be credited with the liabilities of the firm so assumed.

It appears that McCullagh conveyed to White all his

interest in the property and assets of the firm, and that White has discharged all the liabilities, and therefore nothing now remains to be done but to ascertain, by taking the accounts between the partners, without having to provide for the sale of the partnership property or payment of the debts, how much is due from one to the other—possibly, in such a case as the present, not a more difficult or complicated matter than frequently occurs at law when the dealings between the parties have extended over a long period and there are cross demands by way of set-off or payment. Yet claims of the latter description are clearly provable in insolvency, the creditor ranking for the balance which may be due to him. Then why should not such a claim as is here in question also be provable? It is I apprehend properly described as an equitable debt, and it is capable of being ascertained by the Court without the intervention of a jury, which circumstance, I think, is the one which distinguishes it from an unliquidated claim, a term which properly describes such demands as arise out of torts or breaches of contract.

Upon the whole I am of opinion that White was entitled to rank upon the estate of McCullagh for the claim in question.

Judgment for plaintiff.

WALKER V. THE BEAVER AND TORONTO MUTUAL FIRE INSURANCE COMPANY.

Insurance—Action on policy—Reference by consent—Right of appeal—Subsequent insurance—Cancellation of insurance—Evidence.

In an action on a fire insurance policy, the learned Judge at the trial, by the consent of the parties, directed a reference, which did not contain any agreement allowing an appeal on the merits.

Held, that an appeal would not lie.

Semble, that the evidence, set out below, sustained the finding of the arbitrator herein, that at the time of the loss the insurance in defendants' company had been cancelled, and a new and valid insurance effected in another company.

ACTION upon a policy of insurance against fire for \$1,000.

Fourth plea: that at the time of the alleged loss the property was not insured by the defendants.

The fifth, sixth, and seventh pleas set up further insurance without consent of the defendants in the Western Assurance Company, and other companies respectively.

The case came on for trial before Moss, C. J. A., without a jury, at Belleville, at the Fall Assizes, 1877, when, by consent, a verdict was entered for the plaintiff for \$200, subject to a reference to the Hon. George Sherwood.

The facts so far as material are stated in the judgment.

The order of reference bore date the 9th day of October, 1877, and was in the usual form of a reference by consent of parties. The arbitrator enlarged the time for making the award, until the 1st July, 1879, and on the 6th June, he made his award, finding in favour of the plaintiff on the issues joined on the first, second, and third pleas, and in favour of the defendants on the fourth, fifth, sixth and seventh pleas. He awarded that the plaintiff had no cause of action against the defendants; and, as to costs, that the plaintiff should bear and pay his own costs of the action and reference, and should also pay the defendants' costs of the reference and the award.

On June 20, 1879, *Shepley* obtained a rule, by way of appeal, calling upon the defendants to shew cause why the award should not be set aside or amended by directing a verdict to be entered for the plaintiff for \$750, or for such other sum as the Court might, upon the evidence, deem proper; or why it should not be referred back to the arbitrator to award in that manner, on the ground that the award was contrary to law and evidence, in this, that the evidence disclosed a binding contract of insurance by the defendants with the plaintiff, and nothing was done to terminate the liability of the defendants upon such contract before the loss occurred, and so the issue on the fourth plea should have been found for the plaintiff: that as to the fifth, sixth, and seventh pleas the evidence shewed there never was any binding contract of insurance entered into by the plaintiff with the Western Insurance Company, and no premium having been paid and no policy issued by them, the defendants were not entitled to set up or rely upon the facts disclosed as constituting a double insurance. That the contract entered into with the agent of the defendants for an insurance in the Western Assurance Company was an entire contract, and the defendants cannot avail themselves of the benefit of that part of their contract which relates to the cancellation of their policy without giving the plaintiff the benefit of the other part of it, which relates to the re-insurance in the Western Assurance Company, but must, if they failed to carry out any part of the contract, put the plaintiff into the same position as he was in before the contract was made; and on the ground that the notice which the agent confessedly had of the alleged subsequent insurance should have been held to be binding on the defendants; and on the ground that the award is bad in so far as it assumes to exercise any discretion over the costs of the suit, which was not within the submission, and also for specifically finding that the plaintiff had no cause of action whatever against the defendants, the matters in question in this cause only having been referred to him.

On June 28, 1879, *Robinson*, Q. C., shewed cause. The question is, whether there was a subsequent insurance in the Western Assurance Company without notice to the defendants. If there was their policy is avoided. On the facts a subsequent insurance is proved. The evidence also shews that the defendants' policy was cancelled, and on one ground or other the plaintiff must fail: R. S. O. ch. 161 secs. 39, 40, 43; *Bruce v. Gore District Mutual Ins. Co.*, 20 C. P. 207; *Miall v. Western Assurance Co.*, 19 C. P. 270; *Zenos v. Wickham*, L. R. 2 H. L. 296; *Wood on Insurance*, sec. 352; *David v. Hartford Ins. Co.*, 13 Iowa 69.

Ferguson, Q. C., contra. There was no contract of insurance at all with the Western. The fact that they paid part of the loss is no answer. The defendants must shew that the interim receipt was valid without payment of the premium. That is a necessary element to the existence of the contract of insurance. Nothing else will do: *May on Insurance* pp. 406, secs. 340-5, 412; *Walker v. Provincial Ins. Co.*, 7 Grant 137, in appeal, 8 Grant 217.

August 22, 1879. OSLER, J.—At the time the rule *nisi* was granted, and during the argument, I was under the impression that the reference in this case was a compulsory reference, or that there was a clause giving a right of appeal; but on examining the papers I find that it is a reference by consent of parties, and not under the 189th or 195th sections of the Act, R. S. O. ch. 50. In fact it appears to be a case which the Judge would have no power to refer at the trial except by consent.

This being so there is no right to move against the award by way of appeal, in the absence of an agreement in the submission that there may be an appeal: R. S. O. ch. 50, sec. 205. The submission contains no such agreement.

So far, therefore, as the rule seeks to set aside the award, on the ground that it is contrary to law and evidence, or that the arbitrator has taken an erroneous view of the law

and evidence in his findings on the fourth and subsequent pleas, it has been inadvertently granted, and there is no jurisdiction to entertain it: *Wilson v. Richardson*, 43 U. C. R. 365. Improper conduct is not imputed to the arbitrator, and the award is good on its face.

Some objections have been taken in the rule on the latter ground; but it is plain that they are without foundation. Indeed it was hardly attempted to support them.

I might dispose of the rule on this ground alone, namely, that the case is not an appealable one, but the merits having been fully argued I have considered them, and am of opinion that the learned arbitrator came to the right conclusion upon the evidence.

The question was, whether there was evidence to prove a cancellation of the defendants' policy, or of a subsequent insurance without notice to them.

Mr. Ferguson strenuously urged that, inasmuch as the premium for the insurance in the Western had not been paid, there was *ipso facto* no contract of insurance between that company and the plaintiff.

I think the authorities do not support this contention.

In *Walker v. Provincial Ins. Co.*, 7 Grant 137, and in appeal, 8 Grant 217, the defendants' case was that they only accepted the risk upon the condition that the premium should be paid down in cash at the time of effecting the insurance, and that the agent had no power, as the plaintiff knew, to give credit for the amount of the premium. So when by the terms or conditions of the policy or interim receipt itself prepayment of the premium is a condition precedent, unless such condition is waived, performance must be shewn or the risk does not attach: *Wood on Insurance*, sec. 28.

In the case in judgment it was shewn that the plaintiff, who had become dissatisfied with the position of the defendants, applied for the insurance in the Western, and received from the agent of that company, who was also agent for the defendants, what is known as an interim

receipt in which the receipt of the premium was acknowledged : that he and the agent believed that the insurance in the defendants' company was cancelled, and that in the Western substituted for it: that the plaintiff claimed payment of the loss from the Western: that, although that company had instructed their agent before the fire to cancel the insurance, yet when they found that he had omitted to communicate the notice to the plaintiff before the loss occurred, they accepted the responsibility and told the agent to settle on the best terms he could: that the agent, with the assent of the plaintiff, then proceeded to have the damage repaired, and that it was only when it was found, after a considerable expenditure had been incurred, that the repairs could not be proceeded with, because they involved a breach of some municipal regulations against the erection of wooden buildings, that the plaintiff abandoned his claim against the Western, giving as his reason that he was advised that it might jeopardize another insurance held by his mortgagee in the London, Liverpool and Globe Insurance Company. The insurance in the Western was thereupon declared off by that company, not on the ground of non-payment of the premium, but because of the existence of prior insurance with the defendants.

Upon such a state of facts it seems to me that the pleas were *prima facie* proved, and that the plaintiff was called upon to give some evidence of the want of authority of the agent to dispense with prepayment of the premium, or, at the very least, to shew that the company had not been made aware of the non-payment when they authorized their agent to settle the loss.

I have not overlooked the fact that on the day after the fire the plaintiff's attorney without any instructions from him, so far as the evidence discloses, sent a notice of the loss to the defendants; but I do not think that this outweighs the evidence of the subsequent acts of the plaintiff and the Western Insurance Company. In fact the sole reason, as it appears to me, for not following up the West-

ern, and obtaining payment from them, seems to have been the fear, whether well founded or not, which the plaintiff's attorney entertained, that the insurance which a mortgagee of the plaintiff held upon the same property in the London and Liverpool and Globe Insurance Company would be avoided.

But for the reasons I have mentioned I think there was evidence before the learned arbitrator which justified him in finding that the defendants' policy had been cancelled, and that there had been a new and valid insurance in the Western.

The rule must therefore be discharged, with costs.

Rule discharged.

TRINITY TERM, 43 VICTORIA, 1879.

(*August 26th to September 6th.*)

THE HON. ADAM WILSON, C. J.

" " THOMAS GALT, J.

" " FEATHERSTON OSLER, J.

WALTON v. THE CORPORATION OF THE COUNTY OF YORK.

Ways—Ditches—Necessity to fence or grade—Accident—Negligence.

In an action by plaintiff for damages sustained by him by reason of his horse and buggy falling into a ditch by the side of a county road known as the Kingston Road, it appeared that the road, which ran east and west, was 59 feet wide between the fences, the actual travelled part between the ditches being 30 feet, the southerly 10 feet of which extending to and 18 inches of the ditch in question was macadamized. The ditch was about 4 feet wide at the top sloping to about $2\frac{1}{2}$ feet at the bottom, and its depth from the edge of the ditch was 15 inches, from the extremity of the macadamized part $22\frac{1}{4}$, and from the crown of the road 28 inches.

Held, that the plaintiff could not recover, for that the having such a ditch without guards or railings, or without slanting the roadway to the bottom of the ditch so that the plaintiff could drive into it without upsetting, was no evidence of neglect on the defendants' part to keep the road in repair.

Held, also, on the evidence, set out below, that there was no contributory negligence on the plaintiff's part.

DECLARATION—First count: for not keeping the East York Road, commonly called the Kingston Road, in sufficient repair with sufficient guards and railings, so that the same became and was greatly out of repair and dangerous to persons travelling on and using the same, by means of which the plaintiff, lawfully travelling with his horse and buggy in his charge upon and along the said highway, and close to a deep excavation there, where such guards and

railings were necessary for the safety of persons travelling along the said highway, was thrown and fell with his horse and buggy from and out of the said buggy, down and into the said excavation, whereby he had his leg broken, and he and his horse wounded and injured, and he was prevented from attending to his business for a long time, and incurred expense for medical attendance.

Second count: alleging that the defendants being possessed of the highway, and while possessed of it, and contrary to their duty, suffered it to fall greatly into disrepair, and caused or permitted a deep trench or ditch to be excavated and remain open upon the south side of the highway, near the centre thereof, and about twelve feet from its southern limit, to the depth of three feet, and about four feet in width, by means whereof, and for want of repair, and for want of sufficient guards and railings as were necessary for the safety and protection of persons travelling thereon, the plaintiff was injured, as before stated.

Pleas.

1. Not guilty.
2. That the defendants were not possessed of the highway.
3. That more than three months expired after the damages were sustained before the commencement of the action.

Issue.

The cause was tried before Osler, J., and a jury, at Toronto, at the Spring Assizes of 1879.

The general facts were, that the road at the place of the accident was 59 feet wide between the fences. About 30 feet of the central part was used for actual travel, and that was between the ditches.

The southerly part of the 30 feet was macadamized for the width of about 10 feet. The ditch just south of the 30 feet was about four feet wide at the top, sloping to about $2\frac{1}{2}$ feet at the bottom. It was about 15 inches deep, measuring from the edge of the ditch, and about $22\frac{1}{2}$ inches

deep, measuring from the south line of the stone road, that is 18 inches back from the edge of the ditch ; and it was about 28 inches deep measured from the crown of the road.

It was said the south ditch was too near to the travelled part of the road, and that it should have been nearer the fence, but the ditch was where it is usually placed in country roads.

It was said also the ditch was too deep ; but the evidence shewed that the drainage must be sufficient to carry off the water from the lower part of the macadamizing, and that the ditch was not too deep for that purpose.

It was said the ditch should have sloped from the travelled part of the road to the bottom, as roads are commonly made in towns and cities, in place of going so abruptly down. It was answered that such a plan had been tried, and it did not answer ; that the road was worn down towards the ditch by waggons and cattle at large, and the ditch filled up. And it was said, if the ditch was not graded down in that way, it should have been fenced or otherwise guarded to prevent accidents. It was answered that no ditches of that kind have ever been fenced : that the fencing of them would be a nuisance and more dangerous than the ditch itself ; and that it would be unreasonable to require it, because the expense throughout the county would be very great, and it would be nearly impossible to keep up these fences or repair them.

The plaintiff was driving along the road, as stated in the declaration, and, while driving, a cow, which was grazing in the ditch, got suddenly up out of it and frightened the plaintiff's horse, which made him shy, and the horse and the buggy got into the ditch ; the buggy was upset, and threw the plaintiff and his wife out, and the plaintiff had his leg broken.

The learned Judge directed the jury to the effect that it was for them to determine whether the road described, and upon which there was a very great travel, was such a road as was safe and fit for the public travel, and which

the county of York could be called upon reasonably to provide and maintain for the public use, and whether the road should have been wider, or the ditches more sloping at the sides.

The defendants' counsel objected to the charge. He contended that the learned Judge should have told the jury that, although a width for road of 66 feet was vested in the county, yet, if they provided thirty feet of it for actual travel, and if that width was sufficient for the public convenience, and in good repair, that the defendants had done all they were bound to do, unless it was shewn an unreasonable width was taken up in ditches; and that a drain such as this, alongside of the travelled road, was not dangerous, as it was shewn to be required.

The jury found a verdict for the plaintiff, with \$400 damages.

In Easter term, May 21, 1879, *J. K. Kerr*, Q. C., obtained a rule calling upon the plaintiff to shew cause why the verdict for the plaintiff should not be set aside and a nonsuit entered, pursuant to leave reserved; or why a new trial should not be had, because the verdict was against evidence and the weight of evidence, and for the misdirection and nondirection of the learned Judge to the effect before stated.

In this term, September 3, 1879, *Donovan* shewed cause. The existence of the ditch in question was clearly evidence of negligence. The road became vested in the defendants under the order in council of April 4th, 1865, subject to the condition that they should at all times keep it in thorough repair. The defendants, therefore, have even a greater liability imposed on them than is the case of an ordinary county municipality: *Henry v. Mayor of Lyme*, 5 Bing. 91, 1 Bing. N. C. 222; *Winch v. Conservators of Thames*, L. R. 9 C. P. 378; *Nitro Phosphate and Odham's Chemical Manure Co. v. London and St. Catharines Dock Co.*, L. R. 9 Ch. D. 503. But in any event the defendants are liable. The ditch was to near the travelled

way, and was too deep, and it should have been fenced, or graded down to the bottom so as to cause the descent to be gradual, as is the case in cities and towns. The evidence shews that this was a dangerous place, and that accidents had happened there before: *Harrold v. Corporation of Simcoe*, 16 C. P. 43, 18 C. P. 9; *Sherwood v. Corporation of Hamilton*, 37 U. C. R. 410; *Castor v. Corporation of Uxbridge*, 39 U. C. R. 113; *Hadley v. Taylor*, L. R. 1 C. P. 53. If the defendants could not keep the road in repair, they should have closed it up: *Barnes v. Ward*, 9 C. B. 392. There was no evidence of contributory negligence on the plaintiff's part. The case was one for the jury, and the Court should not interfere with their finding: *Dublin, &c. R. W. Co. v. Slattery*, L. R. 3 App. 1155.

J. K. Kerr, Q. C., contra. The decision of this case is most important to county municipalities, as the ditch here is the same as that along every country road in the Province. In dealing with the question all the circumstances must be looked at, and it would clearly appear that there is no liability. The ditch is said to be too near the road, and to be too deep, but it is proved to be where the ditch is usually placed, and to be not deeper than is necessary to carry off the drainage. It is further argued that the road should have been fenced or graded. The cases shew that there is no liability to fence: *Toms v. Corporation of Whitby*, 35 U. C. R. 195. 209; *Wilson v. Mayor, &c., of Halifax*, L. R. 3 Ex. 114; *Cornwall v. Metropolitan Commissioners of Sewers*, 10 Ex. 771, 773; *Sykes v. Town of Pawlet*, 5 Amer. 295; *Hutton v. Corporation of Windsor*, 34 U. C. R. 487; *McCarthy v. Corporation of Oshawa*, 19 U. C. R. 245. Moreover, it would be very unreasonable to require such fences, as the expense to the country would be very great, upwards of \$4,000, while the evidence shews that it would be more dangerous and a greater nuisance than the ditch itself. The plaintiff cannot set up that the ditch should have been graded, for his declaration does not proceed upon that ground, but for the want

of fences or guards, but, even if the objection is open to him, it was proved that such grading had been tried and had failed. There was, moreover, evidence of such contributory negligence as would prevent the plaintiff's recovering.

September 17, 1879. WILSON, C. J.—I think there is no evidence of contributory negligence on the part of the plaintiff. He was driving on the evening of the 11th of October last on this road. It was pretty dark ; he was going home ; he had been shewing the horse he was driving at a fair that day in Scarborough. He was driving on the macadamized part of the road ; and his left wheel was as he believed six or eight feet from the south ditch.

It is clear when the buggy was upset the horse stood with his head in the contrary direction to that in which the plaintiff had been driving. The plaintiff said the horse turned round after the upset or after getting into the ditch.

The defendants contended, especially on the evidence of one or two witnesses, that the horse on shying wheeled round, and in doing so got into the ditch, which would not have happened if the horse had been well in hand at the time.

It is impossible to judge matters so closely as that. I think there is no evidence of neglect on the part of the plaintiff. He was driving carefully and properly along the road, as I judge from the evidence, at the time of the accident.

The other enquiry and the important one is, whether there was neglect on the part of the defendants to keep the road in repair, by having and maintaining a ditch of the kind and at the part of the road before described without guard or railing, or without slanting the roadway to the bottom of the ditch.

The plaintiff contended the ditches should be so made "that a person could drive right into them without upsetting."

It certainly would be a good thing if that could be done,

and when it could not from the depth of the ditch, or from any other cause, that they should be fenced off.

But we have not to consider what would make a road perfectly safe. The canon of municipal law, I take to be that the road shall be reasonably safe and fit for public use and travel. That reasonable safety and fitness must depend on circumstances, as was fully explained by the learned Judge to the jury at the trial. It is plain that a ditch of this kind would not do in a city or town in its thoroughfares, where people have constantly to drive up to the sidewalks. And yet such a ditch may well answer in a township where it is for drainage only, and where people have no occasion to drive to it. Ditches co-terminous with the highways are a necessity. The outcry is not that the drains are not fenced, but that the roads are not drained. It is the road, the travelled part of the road, which the people want to have made well, and to be kept in order; and they know that the first thing to do to make a good road is to make a good drain; and they know that these drains are never covered or fenced off.

I will not say that no country ditch is to be fenced off or guarded. This county has made a rule to fence off all ditches of four feet depth or more. I do not say whether that is the proper rule in such cases or not. It is only necessary I should give an opinion upon the ditch which is now in question, at the side of the road, as that road has been described.

And my opinion is, so far as the Court is to determine the question, that the defendants were not and are not guilty of neglect in not fencing the ditch complained of from the travelled road. In other words, the highway was not out of repair by reason of there being such a ditch as the one in question, running alongside of such a roadway.

It seems from the evidence that a conveyance getting into the ditch would be sure to upset. It was also said that a man was killed by his waggon getting into a ditch six inches deep.

A load of hay or of cordwood would probably upset as

readily by the wheels of one side of the waggon getting into a ditch six inches deep as into one fifteen inches deep, as the engineer by his accurate measurement said it was ; and a load of bricks or other heavy load might break down by the wheels of one side of the waggon going down into a six inch ditch. And if all the ditches of the county, and of every county in the Province, are to be guarded because an accident may happen to a person who or to a conveyance which happens to get into one of them, it would impose upon the municipalities an intolerable burden, and the performance of an almost impossible duty, and the fences put up to shut off the ditch from the road, would be a nuisance greater than the ditch itself. The remedy would be worse than the disease. In this case, notwithstanding the very great misfortune which befel the plaintiff, I think the defendants are not responsible for it. It was an incident and accident of travelling, which can never be made quite safe ; and the injury to the plaintiff was occasioned by one of these accidents, and not by the neglect of the defendants.

In my opinion the rule should be made absolute to enter a nonsuit.

GALT and OSLER, JJ., concurred.

Rule absolute.

AYRE V. THE CORPORATION OF THE CITY OF TORONTO.

Ways—Obstruction by wrongdoer—Depositing ashes on street—Notice.

One S., contrary to the city by-laws, deposited on one of the streets of the city of Toronto, to be removed by the city scavenger carts on the following morning, a quantity of ashes and rubbish so as to cause an obstruction to the street, whereby plaintiff, while driving along the street a few hours afterwards, at one o'clock in the morning, was injured. It was proved that the defendants had no express notice or knowledge of the obstruction until after the accident, but it was urged that notice must be implied, because that the defendants had sanctioned the practice of so depositing ashes, &c., by having permitted it without objection on former occasions, but the evidence was held not to substantiate this.

Held, there was no evidence of negligence on defendants' part, and a nonsuit was entered.

THIS was an action against the defendants for not keeping Queen street, being a highway in the City of Toronto, in repair, but allowing large heaps of ashes and rubbish to be placed and to remain upon the said highway, and leaving the same after night time without any light or signal, whereby the highway became unsafe and dangerous, and in consequence of which the plaintiff drove his horse and carriage against the said heaps of ashes and rubbish, and sustained injury.

The cause was tried before Osler, J., and a jury, at Toronto, at the Spring Assizes of 1879.

The evidence shewed that on the afternoon of 27th of January last a quantity of ashes was placed on Queen street under such circumstances as to cause an obstruction to the highway. This was done by order of a person of the name of Stark. The ashes were placed on the street between the hours of two and five in the afternoon of 27th January.

In consequence of the obstruction caused by this the accident complained of occurred about one in the morning of the 28th.

There was no ground for imputing carelessness to the plaintiff contributing to the accident.

The additional evidence, so far as material, is set out in the judgment.

The learned Judge left the case to the jury more with a view of taking their opinion on the question of damages than for any other purpose. He told the jury that beyond question the person causing the obstruction would be liable, but that, as respects the defendants, they would only be liable when it had remained a sufficient time to warrant an ordinary man in saying that they must have had notice of that fact. He then said: "What I have my doubts about, and the view I am inclined to take of the case at present is, that if such a course of business has prevailed in the course of moving this rubbish with the knowlege of the Corporation officials—and I do not mean the scavenger men, but Coatsworth and his assistants—if a course of conduct has prevailed to their knowledge of refuse matter being left on the street on the night before to be moved away on the following morning—then I would rule at present that the Corporation would be liable, because that is consenting to a course of conduct which would cause such an accident as this. Now is there any evidence to shew that? I confess I myself fail to see any evidence by which such knowledge has been brought home to the knowledge of Coatsworth or Copping, although Copping tells you parties have without authority done so. Copping and Coatsworth have remonstrated. Has it been done with the implied sanction and knowledge of the city officials, Coatsworth and his assistants? Just answer that question, and as you answer it you will find a verdict for the plaintiff or a verdict for the defendants.

The jury found a verdict for the plaintiff.

In Easter term, May 19, 1879, *McWilliams* obtained a rule calling on the plaintiff to shew cause why a nonsuit or verdict for defendants should not be entered, pursuant to the leave reserved.

In this term, August 28, 1879, *J. Reeve* shewed cause. The defendants do not deny the existence of the obstruction, or its having caused the accident, and the only question is whether there was notice to or knowledge by the

corporation. There is no evidence of express notice, but there is clearly evidence from which notice may be implied. The place where the ashes were deposited is one of the most important and frequented thoroughfares in the city, and the time they were allowed to remain there is evidence from which it may reasonably be presumed that the corporation had notice. Moreover, the evidence shews that the corporation officials whose duty it was to remove ashes, &c., had allowed the custom to prevail of so depositing the ashes the day before, by permitting it to be done on former occasions. He referred to *Dewey v. City of Detroit*, 15 Mich. 307; *Reed v. Inhabitants of Northfield*, 13 Pick. 94; *Wendell v. Mayor, &c., of Troy*, 39 Barb. 329; *Mersey Docks Trustees v. Gibbs*, L. R. 1 H. L. 93; *Brady v. City of Lowell*, 3 Cush. 121; *Castor v. Corporation of Uxbridge*, 39 U. C. R. 113.

McWilliams, contra. There is no evidence of any notice or knowledge by the defendants. Even if it can be assumed that the corporation officials had notice that the ashes were being deposited on the street, they would naturally presume that the intention was to immediately remove them, or that if left there, they would be guarded against by a light. The period during which they were left there was not of itself sufficient to imply notice. In the American States where they have legislation as to the amount of time necessary to raise the implication, it must be at least twenty-four hours. Here it was only from about five in the afternoon until about one o'clock on the following morning. As to the corporation officials sanctioning the practice, the evidence clearly failed to substantiate it. He referred to *Castor v. Corporation of Uxbridge*, 39 U. C. R. 113; *Dillon* on Municipal Corporations, 2nd ed., vol. ii., sec. 790.

September 17, 1879. GALT, J.—It is plain that the officials of the Corporation had no notice whatever of the existence of the obstruction until the morning after the accident. Buchanan, the section foreman of the division,

and whose duty it was to remove ashes, states positively that he had no notice whatever. Messrs. Coatsworth and Copping state the same; but it was urged that it was usual for persons to deposit ashes in the streets, and therefore that the defendants should be held responsible as tacitly sanctioning such a practice, although it is in direct contravention of the by-law of the city, By-law No. 502, sec. 38.

I have carefully read the evidence bearing upon this point, and I can find nothing in it to sustain such a contention.

It appears that persons do throw out ashes on the morning when the scavenger carts are expected to make their rounds, but, as far as I can judge, only in small quantities, in place of placing them in a barrel or box. I can see nothing that would induce me to believe the city officials ever knew of or sanctioned such a practice as putting out an accumulation of ashes amounting to several cart-loads at a time and leaving them from the afternoon of one day until the morning of the next. It is true that Stark, who has been the cause of this trouble, states that he has done so on former occasions, but that is no evidence that either Mr. Coatsworth or Mr. Copping was aware of it.

The law on this subject has been most carefully considered by the late Chief Justice Harrison in the case of *Castor v. Corporation of Uxbridge*, 39 U. C. R. 113, at p. 126, and he lays down three propositions, for which he cites very numerous authorities.

First—"The action is based on negligence. There cannot in such a case be negligence unless there be knowledge or means of knowledge. The mere existence on a highway of an obstruction is not enough to establish negligence on the part of the corporation."

Second—"It is necessary in some manner to connect the corporation with the obstruction, either as having directly caused it, assented to it, * * or with a knowledge of its existence and being negligently ignorant of it, permitting it to remain."

Third—"Where the obstruction is the work of a wrong-doer, notice of it should be brought home to the corporation, or the defect be so notorious as to make it reasonable to fix the corporation with notice of it."

In the case now before us the time when the obstruction was placed on the highway was the afternoon of a winter's day, and it was not completed until after dark, while the accident occurred a few hours afterwards, before any notice arising from negligence in not observing it could be imputed to the officials of the Corporation, and was itself the work of a wrong doer.

I agree entirely with the opinion expressed by the learned Judge, when he said he failed to see any evidence which would render the defendants liable by reason of knowledge being brought home to the Corporation officials of parties acting in contravention of the by-law, by having refuse left on the streets on the night before to be removed in the morning. I mean in quantities like that now complained of, so as to cause what may reasonably be considered obstructions.

I therefore think there was no evidence of negligence on the part of the defendants, and that the rule should be absolute to enter a nonsuit.

WILSON, C. J., and OSLER, J., concurred.

Rule absolute.

HOVEY V. CASSELS ET AL.

Cheque or order on firm—Acceptance by partner not in firm's name—Bona fides—Liability.

The three defendants carried on business in partnership as stock brokers and financial agents, under the name of Cassels, Son & Co. By the articles of partnership it was required that all bills, drafts, cheques, &c., should be signed in the name of the firm. It appeared that one of the defendants and one L. were engaged in private transactions not connected with or known to the firm, and in the course thereof L., who had no available funds in the firm's hands, drew a cheque or order on them in favour of the plaintiff for \$600, and C. marked across it "Good, A. B. C." L. then procured plaintiff to discount it at the rate of 30 per cent per annum, and to hold it for a month.

Held, that the firm were not liable on such order, for the acceptance was not in the name of the firm, and the evidence shewed the cheque or order was not taken by plaintiff in good faith.

DECLARATION: For that one R. C. Lean on the 27th June, 1878, by his cheque or order for the payment of money, directed to the defendants under the name, style, and firm of Cassels, Son & Co., bankers, required them to pay to the plaintiff or order the sum of \$600, and delivered the said cheque to the plaintiff, and the said cheque was duly accepted and marked "good" by the defendants, and the defendants promised to pay the same, and the plaintiff afterwards duly presented the said cheque to the defendants for payment, but payment thereof was refused.

There were also the common counts, but nothing turned on them. Judgment passed against defendant Campbell by default. The other defendants, the Messrs. Cassels, pleaded:—

1. Non-acceptance.
2. That the defendants did not mark the said cheque "good" as alleged.
3. That the defendants did not promise to pay the said cheque as alleged.
4. That the said Lean did not draw the said cheque as alleged.
5. A want of stamps.

Nothing turned on these two last pleas; for as to the former it was proved that Lean did draw the cheque, while

as to the latter the learned Judge at the trial allowed stamps to be affixed.

A plea on equitable grounds was afterwards added, but the ground on which the case is decided renders it unnecessary to consider the evidence on this plea.

The cause was tried before Osler, J., without a jury, at Toronto, at the Spring Assizes of 1879.

The defendants, in the month of June, 1878, carried on business together in partnership as stock brokers and financial agents, under the name and style of Cassels, Son & Co. The members of the firm were, Richard S. Cassels, Walter B. Cassels, and Arthur Bedford Campbell. By the articles of partnership "all bills, drafts, cheques, promissory notes, and acceptances, and endorsements thereon, and all receipts, payments, letters or other matters and things relating to the said business, shall be signed in the name or style of the said firm by some one or more of the said partners, or by some duly authorized clerk appointed by the partners, or the majority of them, for that purpose."

It appeared from the evidence both of a witness named Lean and of the defendant A. B. Campbell, that they were engaged together in some transactions which were in no way connected with the business of the firm, and which were in direct contravention of the articles of partnership. They were thus described by Lean: "These kiting transactions are private transactions between me and Mr. Campbell. The firm did not know anything about them."

During the course of these transactions, the witness Lean drew an order in the following form:—

"TORONTO, June 27th, 1878.

"Cassels, Son & Co.

"Pay to A. Henry Hovey, Esq., or order, six hundred dollars.

"Good.

(Signed)

"R. C. LEAN.

"A. B. C."

He took this to Campbell, who marked it in the corner with red ink, "Good, A. B. C." as appears above. At the time when this was done, Lean had not funds in the hands

of Cassels, Son & Co. to meet this order. After obtaining this *quasi* acceptance from Campbell, Lean took the order to the plaintiff, and made an arrangement with him whereby the plaintiff agreed to discount it at the rate of 30 per cent. per annum, and to hold it for one month. This was carried out, and Lean received a cheque from him for \$585.

The plaintiff said: "The exact rate for discounting exhibit 1" (the order above mentioned) "is thirty per cent. per annum ; that was deducted at the time, and I paid him the difference ; that was with the understanding that I should hold exhibit 1 for a month. It was presented for payment on the 29th of July."

Payment was refused, and this action was brought. The partnership was dissolved on the 25th July by the retirement of Campbell from the firm.

The learned Judge, after a carefully considered judgment, entered a verdict for the defendants, on the ground that as in this case the acceptance or promise to pay relied on was not in the partnership name, but in the name of one partner only, and in fraud of the partnership, the defendants were not liable.

In Easter term, May 19, 1879, *McMichael*, Q.C., obtained a rule calling on the defendants to shew cause why a verdict should not be entered for the plaintiff, pursuant to leave reserved ; or why there should not be a new trial on the law and evidence.

During this term, September 1, 1879, *J. K. Kerr*, Q.C., and *Walter Cassels*, shewed cause. The evidence shews that this was a private transaction between Lean and Campbell to raise money, and that the plaintiff did not receive the so-called cheque as a marked cheque in good faith, and in the ordinary course of business ; for had he done so, there would have been no object in discounting it at 30 per cent., and holding it for a month, for he would know that the amount would have been charged against the cheque, and that he could immediately on presentment have procured payment of the same : *Daniel on Negotiable*

Instruments, vol. i., p. 576-7, sec. 769, vol. ii., p. 525-6, secs. 1602-3. The mere giving of the cheque did not create any liability, for a cheque does not amount to an equitable assignment of money in the hands of the banker: *Pollard v. Bank of England*, L. R. 6 Q. B. 623; *Goodwin v. Roberts*, L. R. 10 Ex. 337, 351-2; *Lamb v. Sutherland*, 37 U. C. R. 143; *Hopkinson v. Forster*, L. R. 19 Eq. 74; *Bank of Republic v. Millard*, 10 Wallace 152. Even if the plaintiff can sue as assignee of a chose in action under the statute, he can be in no better position than Lean, and he could not recover. In no event could the firm be liable on the cheque. This is not an action against a bank, where the practice prevails of the ledger-keeper marking cheques, but against a private partnership. The cases clearly shew that to render the partnership liable there must be an acceptance on behalf of and in the name of the firm. In addition, the articles of partnership expressly provide that there is to be no liability unless the acceptance is in the name of the firm. Here, not even is the name of the partner signed, but merely his initials: *Kirk v. Blurton*, 9 M. & W. 284; *Hogarth v. Latham*, L. R. 3 Q. B. D. 643; *Yorkshire Banking Co. v. Beatson*, L. R. 4 C. P. D. 204; *Owen v. Van Uster*, 10 C. B. 318; *Roscoe's N. P.*, 13th ed., 336; *McCord v. Field*, 27 C. P. 391; *Forster v. Mackreth*, L. R. 2 Ex. 163; *Ramchurn Mullick v. Luchmeechund Radakissen*, 9 Moore P. C. 46, 69.

McMichael, Q.C., contra. The evidence shews that the defendants were carrying on business as private bankers, and the same rules apply to them as to public banks. The course adopted here for marking cheques was the same as adopted by such banks, with the creation of the same liability. It is well known that bankers allow their customers to overdraw their accounts, and to mark their cheques good, and so render themselves liable to pay them, although there may be no funds to meet them. This may have been the course pursued here, and there was nothing to prevent their agreeing with Lean that if they marked his cheque it would not be presented for a month,

and this would explain the object he had in paying the 30 per cent., to have it held over for the month. The evidence, however, does not shew that there was no money to meet the cheque. All that appears is, that Lean's money was deposited with the defendants as a margin on stock, and the defendants might, if they desired, apply the money in payment of the cheque. There is no evidence of fraud on the plaintiff's part, but that he was a *bona fide* and innocent holder of the cheque, and as such he is entitled to recover: *Keene v. Beard*, 8 C. B. N. S. 372; *Daniel* on Negotiable Instruments, vol. ii., p. 524-528, sec. 1601-6; *Byles* on Bills, 13th ed., 21; *Robson v. Bennett*, 2 *Taunt.* 388; *Serle v. Norton*, 2 M. & R. 404 note.

September 17, 1879. GALT, J.—Since the argument the case of *Yorkshire Banking Co. v. Beatson* has been reported in L. R. 4 C. P. D. 205. That was a case in which it was sought to make the defendant Mycock liable as a partner of Beatson, on a bill endorsed and accepted in the name of William Beatson.

The head note is: "If the name of a partnership firm be merely the name of an individual partner, proof that he signed such name to a bill of exchange is not enough to make the firm liable on the bill. To establish the liability the holder of the bill must further prove that the signature was put to it by the authority and for the purposes of the firm." A number of cases are cited to shew that even in cases in which the partnership name consists of the name of only the partner signing or accepting a bill of exchange, it is incumbent on the person claiming against the partnership to shew that the bill of exchange was drawn by the person whose name is used as and for the partnership. Among others, the Court rely on the case, *Miles's Claim*, L. R. 9 Ch. 635, in which James, L. J., states the law to be as follows: "It is the law of this country, and it has always been the law of this country, that nobody is liable upon a bill of exchange unless his name or the name of some partnership or body of persons, of which he is one, appears either on the face or on the back of the bill."

It is plain from the articles of partnership that the only way in which any of the partners could bind the firm in the present case was by using the name of the firm. The defendant did not pretend to do so. He did not even sign his own name. The name of the firm does not appear to this acceptance, and consequently the other members are not liable thereon.

WILSON, C. J.—I wish to add that there are circumstances in the evidence which shew that the plaintiff did not deal with this document in an ordinary or business-like manner.

The plaintiff knew that Campbell, one of the partnership defendants, had carried on private transactions with Lean. He saw Campbell's initials to Lean's cheque, marking it "good," yet he agreed to hold it over for a month at the rate of 30 per cent. per annum. He must have known that Lean would in the usual course of business be charged at once with a cheque so marked; and that it was a strange and unusual mode of business for Lean to ask him to hold over the cheque at so high an interest, when the money was lying in the bank at the plaintiff's command. And Lean himself could not after that use the money.

I should infer that Lean would not have paid the large discount for the month's forbearance if he really had the money in the defendants' hands at the time the plaintiff took the cheque, and the presumption would be that he had not the money so represented by the addition "good," and that it was for that reason he asked the forbearance from the plaintiff at so heavy a price for it. He could not upon any sensible ground have asked such an indulgence upon such terms, if he had in truth the money in the defendants' hands at the time, and if he had been charged with the amount, as he should have been, when the cheque was marked "good;" and all these facts the plaintiff, as a business man, should have known, and no doubt did know.

As a fact, Lean had no such money with the defendants as that cheque represented. The cheque was in reality a

private transaction between Lean and Campbell, one of the defendants.

The defendants are not liable for the cheque, assuming it to have been marked "good" in the partnership name of the defendants by Campbell in fraud of his partners, unless the plaintiff took it in good faith and gave value for it.

I think there are circumstances from which it may well be presumed that the plaintiff did not take it in good faith, although he may have given value for it.

The rule should, therefore, be discharged.

OSLER, J., concurred.

Rule discharged.

THE MERCHANTS BANK v. MACDOUGALL.

Promissory note—Notice of protest—Proof of sending—New trial.

To prove notice of dishonour to defendant, an indorsee of a note, the receipt of which he denied, the notary's clerk stated that he had no independent recollection of the matter, but that he had no doubt of having mailed the notice to the address given by the defendant from the statement to that effect in the protest which was in his hand writing, and from the entries in the notarial register kept in the office, which was produced, and which contained the particulars of the entry, and the day and hour of mailing the notices. His practice, he said, was to make the entry just before mailing, when he would look at his watch, note the time, and then go to the post office.

Held, sufficient evidence of the mailing of such notice, and the jury having found for the defendant, a new trial was ordered.

ACTION upon a promissory note endorsed by the defendant.

The only plea material to be considered is the third, viz., that no notice of dishonour was given to the defendant.

The cause was tried before Galt, J., and a jury, at Toronto, at the Summer Assizes of 1879.

The plaintiffs put in the notarial protest, from which it appeared that the note was presented for payment on the 3rd February, 1879, the day on which it fell due, and that notice of dishonour was mailed on the same day to the maker, and the two endorsers, all of whom resided in Toronto.

The defendant was called, and deposed that he never received any notice of dishonour: that he resided on Carlton street in the city of Toronto, and his name and address appeared in the City Directory; and that his letters were always delivered by the postman.

The notary's clerk swore that he mailed the notices mentioned in the protest to the addresses mentioned therein on the 4th February: that he had no doubt of the fact; and he produced the office book or notarial register, which contained the date of the protest, the bank number of the note, the name of the maker, and payee, and other particulars of the note, together with the initials of the person by whom the note was presented and the notices mailed, and the protest charges. The postage was charged three cents. The time when the notice was mailed was marked as 11.55 a.m., February 4th, 1879.

On cross-examination he said that the protest was in his handwriting, and that the notices were mailed on the 4th, notwithstanding the protest was dated the 3rd February: that he did not recollect anything of the matter independent of the book produced: that he had no recollection of the matter except what was contained in the book which he had initialed. The endorser's name was never put in the book.

On re-examination he said: "I make these entries just before I post the notices. I take out my watch and note the time, and then go to the post office."

The jury were told that it was for them to say whether the evidence satisfied them that the notice was actually mailed to the defendant: that the plaintiffs were not obliged to prove that the defendant received it.

The jury found a verdict for the defendant.

In this term, August 27, 1879, *H. J. Scott*, obtained a rule nisi calling upon the defendant to shew cause why the verdict should not be set aside and a new trial granted, on the ground that notice of dishonour was proved, and that the verdict for the defendant was against law and evidence, and the weight of evidence.

During the same term, September 4, 1879, *Meek* (with him *Norris*), shewed cause. The notice sent to "R. McDougall, Toronto," was insufficiently addressed : *Walter v. Haynes*, R. & Moo. 149. There was no sufficient evidence of the sending of the notice. The notary's clerk could not prove the fact of having mailed the notices from an entry which only shewed that he was about to do so.

H. J. Scott, contra. The evidence was clearly sufficient to prove the mailing of the notices : *Taylor* on Evidence, 7th ed., vol. i, p. 593 ; *Macdougall v. Wordsworth*, 8 C. P. 400. The only address given by the endorser being "R. McDougall, Toronto," and the notice having been sent to that address this was sufficient for the purpose of notice of dishonour : 37 Vic. ch. 47 sec. 1, D.

September 17, 1879. *OSLER*, J.—In my opinion there should be a new trial on the ground that the verdict is against evidence. I think there was very satisfactory evidence of the mailing of the notice, amply sufficient to rebut any inference which might be drawn from the fact that the defendant did not receive it. It was not necessary to prove that it was received, and any miscarriage in the post-office would not prejudice the party giving it : *Byles* on Bills, 7th ed., p. 218. If the course of business proved had been only that the notice was put, with other letters, to be taken to the post, and the person whose duty it was to post them, though having no personal recollection of the fact, had sworn that he had no doubt he had posted it with other letters on that day, the evidence would have been sufficient : *Skilbeck v. Garbett*, 7 Q. B. 846.

In the case of *Johnson v. Provincial Ins. Co.*, 27 C. P. 464, the clerk who had charge of the books, whose duty

it was to address them to the parties, and to enter them in the mailing book, swore that he had so addressed and entered them, and, though he had no personal recollection of it, he had no doubt the letters were mailed. From the evidence as given in the report, it is not very clear that this clerk was the person whose duty it was to mail the letters.

On this evidence, Gwynne, J., observed: "I cannot very well see how a verdict finding that the letter had not been mailed could have been sustained. Where a large number of letters are daily mailed in the course of a large business, it would be almost impossible to prove the mailing of any particular letter upon any particular day after the lapse of months, if the evidence given in this case was insufficient for the purpose, or if against such evidence a jury might arbitrarily find that none was mailed merely because the party interested in establishing that it was not should deny its receipt."

In the present instance the evidence of mailing the notice is to my mind much stronger and more conclusive than in the case just referred to. It is not surprising that the defendant should not have received a letter addressed as this appears to have been, but for that result he has only himself to complain of, as he ought to have supplied a better address.

I do not attach much weight to the circumstance so strongly pressed upon us by Mr. Meek, that the notary's clerk made and initialed the entries in the register just before instead of just after the time at which the notices are said to have been sent. The cardinal fact is that from that entry, so initialed, and the protest, he is able to swear that he had no doubt the notices were mailed at the time stated. I see nothing in the evidence to warrant any finding contrary to this.

WILSON, C. J.—I agree that the personal testimony of Mr. Fraser, the clerk of the notary, that he had no doubt he mailed the notice to the defendant on the 4th of Feb-

ruary, taken in connection with the written testimony, is such evidence upon which the plaintiff should have had a verdict.

The rule will be absolute for a new trial, with costs to abide the event.

GALT. J., concurred.

Rule absolute.

DONLEY, ASSIGNEE, v. HOLMWOOD.

Joint stock company—Insolvency.

Held, that the directors of a joint stock company incorporated under the "Canada Joint Stock Companies Letters Patent Act, 1869, 32-33 Vic. ch. 13, D.," and subject to the provisions of the Insolvent Act of 1875, cannot, without being authorized by the shareholders, make a voluntary assignment in insolvency.

THIS was an action brought by the plaintiff as assignee of the Norfolk Transportation Company, insolvents, under the Insolvent Act of 1875, to recover the amount due by the defendant for calls upon shares held by him in that company.

The defendant pleaded : 1. That the plaintiff was not assignee as alleged ; and, 2. Never indebted.

The case was tried before Burton, J.A., without a jury, at Simcoe, at the Spring Assizes of 1879.

The material facts were, that the Norfolk Transportation Company were incorporated by letters patent, dated 23rd November, 1873, under the "Canada Joint Stock Companies Letters Patent Act, 1869," 32-33 Vic. ch. 13, D.

On the 3rd of December, 1878, a demand was served upon the president of the company by a creditor, requiring them to make an assignment under the provisions of the Insolvent Act.

On the 5th of December, at a regular meeting of the directors, one of whom was the creditor who made the demand, a resolution was passed authorizing and instructing the president of the company to make an assignment of the estate and effects of the company under the provision of the Insolvent Act for the benefit of their creditors in pursuance of the demand.

On the 5th of December, the president executed an assignment under the Act to the plaintiff, an official assignee.

The present action had been brought before these proceedings took place, and the plaintiff, on becoming assignee, had his name substituted for that of the company.

At the trial the plaintiff put in as *prima facie* evidence of the defendants' liability, pursuant to the 28th section of the Act, a certificate under the seal of the company, and purporting to be signed by their secretary, to the effect that the defendant was a shareholder, that the calls had been made upon him, and that the amount sued for was due thereon.

The defendant contended (1) that the directors had no power to make the assignment without the authority of the shareholders; (2) that the plaintiff, suing as assignee, could not avail himself of the certificate in proof of the defendant's liability, but must prove the case as at common law; (3) that if the assignment was valid the company was dissolved, and therefore there was no officer of the company by whom the certificate could be given; (4) that the calls were illegal because they were shewn to have been made at a meeting held at a place which was not the head office of the company, and by directors who were not qualified to act.

The learned Judge reserved his judgment, and afterwards entered a verdict for the defendant on the first objection, over-ruling the others.

In Easter term, May 22, 1879, *McCarthy*, Q.C., obtained a rule *nisi* to set aside the verdict, and enter it for the plaintiff, pursuant to the Common Law Procedure Act.

In this term, September 1, 1879, *Falconbridge* shewed cause. The principal question, and the one upon which the learned Judge at the trial based his judgment, is, whether the assignment made here without the consent of the shareholders was valid. There is no provision in the Joint Stock Companies Act, 32-33 Vic. ch. 13, D., under which the company was incorporated, as to proceedings in insolvency, and therefore the case must be governed by the Insolvent Act. Under the Insolvent Act an assignment without such consent is clearly invalid. Section 147, which contains the provisions for the directors making an assignment, expressly declares that they must be duly authorized thereto, which would mean by the shareholders.

The argument upon the other objections taken is not given, as the judgment does not proceed upon them.

McCarthy, Q.C., contra. The assignment is perfectly valid. Section 147 only applies to the case of a compulsory and not to that of a voluntary liquidation. Sub-section 15 clearly refers to the case where some step has been taken against the company for a compulsory winding up, as for instance where there has been an application to a Judge for a writ of attachment. The right therefore to make an assignment exists under the other sections of the Act, and no restrictions exist as to the right of the directors to make it. There are no English cases expressly in point, though the cases of *Wilson v. Miers*, 10 C. B. N. S. 348, and *Bank of Switzerland v. Bank of Turkey*, 5 L.T. N. S. 549, go very far in support of the plaintiff's contention. The American decisions however are expressly in point, and establish the right of the directors to make the assignment: *Sargent v. Webster*, 13 Metcalfe 497; *Dana v. Bank of United States*, 5 Watts & Serg. 223, 247; *Field on Corporations*, secs. 146-152; *Green's Brice on Ultra Vires*, 102, 411, 413, 414.

September 17, 1879. OSLER, J.—The principal question is, whether the directors of the Norfolk Transportation Company, an incorporated company subject to the provisions of the Insolvent Act, could make a voluntary assignment under that Act without the consent of the shareholders.

The 16th section of the "Canada Joint Stock Companies Letters Patent Act, 1869," 32-33 Vic. ch. 13, D., enacts that the affairs of the company shall be managed by a board of not less than three directors.

The 22nd section provides that the directors shall have full power in all things to administer the affairs of the company, and defines their powers and duties. It enables them to make by-laws not contrary to law or the provisions of the Act: (a) as to the capital stock; (b) as to the directors and appointment and removal of officers, &c.; (c) the place and manner of holding and calling the annual and other meetings of the company and directors. Every such by-law, unless confirmed in the meantime at a general meeting of the company, shall only have force until the then next annual meeting, and in default of confirmation thereat, shall cease to have force. Lastly, the section in question provides that one-fourth part in value of the shareholders of the company shall at all times have the right to call a special meeting thereof for the transaction of any business specified in such written requisition and notice as they may issue to that effect.

In neither of these sections, and they are the only ones in the Act which the plaintiff invokes in aid of his contention, is any express power conferred upon directors to place their company in liquidation, or to enter into any arrangement looking to that end. The "affairs of the company," which the directors are authorized to manage and administer, are, in my opinion, the business for which the company was incorporated and to be carried on, and cannot by any reasonable intendment be construed to embrace an act by which the whole estate and property of the company is transferred, and the result of which is to

wind up the business of the company, and probably to cause its dissolution.

Large as are the powers conferred upon the directors by the 22nd section to make by-laws respecting the company's affairs, such by-laws cease to have any force after the next general meeting of the shareholders, unless confirmed thereat. *A fortiori*, then, it would seem that the directors could not by their own mere resolution, as in the present case, authorize an act which would affect the corporate existence of the company, or, at the very least, put an end to its operations.

In *Brice on Ultra Vires*, 2nd ed., p. 598, it is said that directors "are at once the general and yet the special agents of the corporation—special because they have only the authority defined and pointed out by the instruments of incorporation, but general in so far that they have this extent of authority." And again, at p. 599, "They will have none" (no powers) "which are not requisite for the carrying on of the corporate enterprise, and the attainment of the corporate ends."

Although general powers of management will be construed liberally, as, for instance, in *Wilson v. Miers*, 10 C. B. N. S. 549, cited by Mr. McCarthy, where the general powers conferred upon the directors to sell ships was held to authorize a sale of all the vessels the company possessed, yet the directors have not, even if the corporation itself has, power by implication to alienate any portion of the corporate assets which is absolutely essential to the existence of the company: *Featherstonhaugh v. Lee Moor Porcelain Clay Co.*, L. R. 1 Eq. 318.

The dissolution and winding up of registered companies is treated of in *Brice on Ultra Vires*, 2nd. ed., ch. vii., p. 837, as a matter for the determination of the shareholders.

The plaintiff relied very strongly upon the case of *Bank of Switzerland v. Bank of Turkey*, reported only, so far as I can ascertain, in 5 L. T. N. S. 549, as one in which it was held that the directors might wind up the affairs of their company. That case, however, is by no means an

authority for the general proposition. The company was a projected one only, and there seemed reason to doubt whether it would ever be brought into operation. The shareholders had filed a petition for winding up, pending which negotiations were entered into for getting over its embarrassments. These failing, the directors communicated with the shareholders, proposing to return the deposits made on the shares taken by them, and thus in effect wind up the company. This proposition was assented to by a large proportion of the shareholders, and their deposits were accordingly paid over to them. Some time after the payment, and when it would have been impossible to place matters in *statu quo*, a dissenting shareholder filed a bill to restrain the company from carrying out the proposed arrangement. Wood, V. C., refused to grant an injunction under the circumstances. The projected company was a concern which was absolutely lifeless. There was no possibility that it could ever be carried on, and the large proportion of the shareholders had actually assented to the course taken by the directors.

The cases in the American Courts, *Dana v. Bank of United States*, 5 Watts & Serg. 223, (Superior Court, Penn.), and *Sargent v. Webster*, 13 Met. 497, do not decide more than that the directors of an insolvent manufacturing or banking corporation have power to assign the whole or part of their property and effects without the consent of stockholders, in trust to pay their debts or preferred creditors.

This power appears to me to be very different from a power to execute an assignment under the Insolvent Act, by which the whole business of the company may be wound up, and, whether a dissolution of the company is thereby occasioned or not, the control and management of its business and affairs may be taken out of the hands of the directors and vested in a receiver.

Apart then altogether from anything in the Insolvent Act, I should have come to the same conclusion as the learned Judge at the trial, namely, that the directors of

this company had no power to authorize the president to execute the assignment in question.

Nor do I think that the Insolvent Act helps the plaintiff's contention.

The 147th section, which is prefaced by the sub-head, "Procedure in the case of incorporated companies," declares that the provisions of the Act shall apply to the estates of incorporated companies not specially excepted, subject to the modifications set out at length in the section. These are very carefully framed so as to prevent a too hasty and improvident winding up of the company, providing that no writ of attachment is to issue except after at least forty-eight hours notice to the company. The Judge, before granting the writ, may order an examination of the affairs of the company by the official assignee. He may, upon this report, call a meeting of the company's creditors to consider whether the business shall be wound up or continued. He may afterwards suspend the issue of the writ for twelve months, and may appoint a receiver (sub-sec. 7), who shall assume and be vested with all the powers vested in the directors and stockholders respecting the calling and collecting the unpaid stock of the company.

Sub-section 15 of section 147, then provides that, "Nothing in the preceding sub-sections shall prevent the president, directors, managers, or employees of the company, *on being duly authorized to that effect*, from making an assignment of the estate of such company to an official assignee in the form provided for by this Act, before the expiration of the delays which may have been granted to such company by the Court or Judge."

These words, "on being authorized to that effect," are applied to the directors as well as the other named officers of the company. They imply that the directors cannot, of their own authority, make such assignment when proceedings for compulsory liquidation are pending, and where such proceedings have not been commenced I find nothing in the Act which gives them more extended powers.

It is unnecessary to consider the other objections argued.

I think the rule should be discharged.

WILSON, C.J., and GALT, J., concurred.

Rule discharged.

STARLING v. THE GRAND JUNCTION RAILWAY COMPANY.

Railway Companies—Compensation for lands taken—C. S. C. ch. 66.

In an action against defendants, a railway company, for compensation for land taken by them and interest thereon, it appeared that in 1874, defendants, without giving any notice or taking any proceedings for acquiring the land under the Railway Act, C. S. C. ch. 66, entered upon it and proceeded with the construction of the railway. No settlement was made, though the plaintiff frequently demanded compensation, until 1878, when on his threatening to proceed against the company, the president, being authorized by the board, instructed the secretary to make a settlement, and he, after seeing the plaintiff, valued the land at \$1,775, allowing 6 per cent interest from the time the land was taken, making in all \$2,199, which the plaintiff agreed to accept. The valuation was shewn to the president, who expressed no dissent, and the written memorandum thereof was given to the plaintiff, and a copy placed among the records of the company. No resolution of the board was passed in regard to the valuation, and no formal contract drawn up, but the valuation was before the board when making the contract for the completion of the road. It was also proved that the plaintiff tendered a conveyance of the land to the company, and their only objection thereto was, that they were unable to pay the money.

Held, under the circumstances, that the plaintiff was entitled to recover the amount of the compensation agreed upon, and the interest.

DECLARATION:

First count: *Trespass quare clausum fregit.*

Second count: That the defendants are indebted to the plaintiff upon an account for money payable by the defendants to the plaintiff for the lands in the first count men-

tioned, taken, occupied, and used by them for railway purposes.

Third count: That the plaintiff was entitled to compensation in respect of certain lands taken by the defendants for the purposes of their railway, and the defendants did not make satisfaction to the plaintiff in respect of said lands under the provisions of the Railway Act, and before the commencement of this suit agreed to pay to the plaintiff \$1,775 as compensation therefor, which the plaintiff was willing to accept. And the defendants entered on the lands and took possession of them, and have become liable to pay the plaintiff the said sum of \$1,775: that before suit the plaintiff prepared and tendered to the president of the defendants a good and sufficient deed of bargain and sale properly executed, and demanded the said sum of \$1,775: and that the president refused to pay. Averring performance of all conditions precedent, and alleging as breach non-payment.

Pleas: Not guilty by statute, Consol. Stat. C. ch. 66, sec. 83; R. S. O. ch. 165, sec. 34; 37 Vic. ch. 43, sec. 3, O., Public Acts.

The case was tried before Cameron, J., without a jury, at Brockville, at the Spring Assizes, 1879.

The plaintiff proved that the defendants entered upon and took the lands in question in 1874, for the purposes of their railway. No notice was ever given, nor any proceedings taken for acquiring the lands under the provisions of the Railway Acts, the defendants being merely trespassers. The plaintiff frequently from that time until 1878, demanded compensation, but no agreement could be arrived at. The defendants in the meantime proceeded with the construction of their railway.

In August, 1878, the plaintiff threatened to take proceedings against the company, and the president instructed their secretary to examine the property and see if an amicable arrangement could be arrived at as to its value. He saw the plaintiff, valued the land, and in the end arrived at an agreement with him as to the amount which the

defendants should pay. He valued the land at \$1,775, and allowed six per cent. interest from the time possession was taken, in all \$2,199. He shewed the president the valuation he had made, and the president did not dissent. A memorandum of the valuation was given to the plaintiff, and a copy was kept among the records of the company.

The secretary said there never was any resolution passed by the board in regard to the valuation. There was no other contract than the memorandum signed by himself. Starling, he said, acceded to it, and of course there was nothing to arbitrate upon. There was no minute made of the matter, nor any resolution passed in regard to it, nor was it certain that the matter in fact was ever brought before the board.

The president of the defendants said: "The plaintiff would not at first be satisfied with the price named by Robertson (defendants' secretary), upon which he was told that the only way left was by arbitration. A few weeks afterwards the plaintiff concluded to accept it. In matters of this kind, and matters where the company are directly liable, general powers are given me to act. They are not mentioned in particular. * * This valuation was before the board when the defendants were arranging their contract with Bickford for completing the road. This deed produced (deed from plaintiff to defendants of the land in question) was tendered to me by Mr. Jellett. Mr. Starling was present. The deed was all right. We did not accept it, because we had not the money to pay for it. That was the only objection. I did not know whether the deed was correct or not. We did not go into particulars. The only reason we did not accept was because we had not the money. Mr. Jellett tendered the deed, and I said the company has not the money to pay you, and he took the deed away with him. * * The matter was never formally brought before the board. It was never brought up and confirmed, so far as the board is concerned. There was never anything done one way or the other. * * When the letter from plaintiff demanding a settlement,

was read to the board, I was instructed, I think, to do something either by arbitration or in some friendly way to ascertain the value. I was instructed to get a valuator to value the property. There was no resolution on the company's books with regard to this letter—no formal action taken and recorded."

The memorandum or agreement referred to by Mr. Robertson was as follows:

"GRAND JUNCTION RAILWAY CO., }
Secretary's Office, Belleville, Sept. 4, 1878. }

"I hereby certify that I have examined some portions of the various lots belonging to C. J. Starling, Esq., taken by the Grand Junction Railway Company for their line of road, and I have estimated the value thereof as follows: Lot 36, &c., total \$1,775, interest, four years at six per cent. per annum, \$424=\$2,199. Such valuation to be in full for all land damages of every nature whatever which Mr. Starling may have against the company. The width taken from each lot to be $16\frac{1}{2}$ feet from the centre line of the railway as now completed on each side of said centre line.

"D. B. ROBERTSON,
"Secretary G. J. R. W. Co."

The defendants moved for a nonsuit on the ground that there was no formal agreement as to price or otherwise binding on the company, and there being no contract the plaintiff's remedy was by arbitration.

The first count was abandoned, and the learned Judge entered a verdict for the plaintiff *pro forma* for \$2,191, leaving the Court to determine whether there was an agreement binding on the defendants. He found as a fact that the president and secretary had authority to determine the value of the land.

In Easter term, May 27, 1879, *Hector Cameron*, Q. C., obtained a rule *nisi* to set aside the verdict for the plaintiff, and to enter a verdict for the defendants, or a nonsuit, pursuant to Common Law Procedure Act; or to reduce the verdict by the amount allowed for interest.

In this term, September 2, 1879, *Britton*, Q. C., shewed cause. The evidence adduced shews that the plaintiff is entitled to recover. The land was taken for the purposes of the railway, and although the taking was in the first instance tortious, as having been taken without plaintiff's assent, and without the required notice or preliminary proceedings under the Railway Act, the plaintiff afterwards assented and claimed compensation, and what subsequently took place between plaintiff and the defendants' secretary amounted to an offer of compensation by the defendants and its acceptance by the plaintiff. The cases shew that where a reference is agreed upon it is valid, notwithstanding all the preliminary proceedings required by the statute have not been complied with, such proceedings only being necessary when the reference is compulsory, and therefore the absence of the notice to treat or of the preliminary proceedings is no answer to the action: *Benson and Port Hope, &c., R. W. Co.*, 29 U. C. R. 529; *Collins v. South Staffordshire R. W. Co.*, 7 Ex. 5; *Fisher's Digest*, p. 7224-7, 7260. The cases also shew that a parol agreement for the sale of land to a railway company for the purpose of the railway is enforceable in equity: *Pauling v. London and North Western R. W. Co.*, 8 Ex. 867; *Patterson v. Buffalo and Lake Huron R. W. Co.*, 17 Grant, 121. A tender of a conveyance of the land was proved, and its refusal by the company, but only on the ground that the company had not the money to pay for it. Even if the amount of the compensation agreed upon is not recoverable, the Court can now direct a reference to the Master to ascertain the proper amount: *Malloch v. Grand Trunk R. W. Co.*, 6 Grant 348. The plaintiff is clearly entitled to interest from the time the defendants took possession. He also referred to *Eastern Counties R. W. Co. v. Hawkes*, 5 H. L. 331; *Wood v. Hamilton and North Western R. W. Co.*, 25 Grant 135; *Smith v. Dublin & Bray R. W. Co.*, 3 Ir. Chan. 225.

McCarthy, Q. C., contra. The action is not maintainable. It is essential that a notice to treat should have been served on the plaintiff, or the requisite proceedings for

acquiring the land should have been taken under the Act. Even if an agreement without such notice or proceedings can be validly made, the agreement here set up is not binding on the company. There was no authority from the company to enter into it. It should have been authorized or ratified by a formal resolution of the company, and should have been under the corporate seal. Moreover, there was no legal tender of a conveyance of the land to the company: *Watts v. Watts*, L. R. 17 Eq. 217; *Corporation of Welland v. Buffalo and Lake Huron R. W. Co.*, 30 U. C. R. 147; *Lowe v. London and North Western R. W. Co.*, 18 Q. B. 632; *Brice on Ultra Vires*, 2nd ed., 577; *Hodges on Railways*, 6th ed., 161-2. There is no right to the interest claimed. The mere taking of possession gives no such right, for it can only arise when the relation of vendor and purchaser is ascertained by ascertainment of the price: *Rhys v. Dare Valley R. W. Co.*, L. R. 19 Eq. 93.; *Catling v. Great Northern R. W. Co.*, 18 W. R. 121.

September 20, 1879. OSLER, J.—Though the defendants were trespassers in the first instance in taking possession of the plaintiff's land without his assent, and without the warrant of the Judge of the County Court, it is nevertheless clear that very shortly afterwards he assented to what had been done, permitted the defendants to remain in possession and construct their road, and simply claimed compensation. He could not afterwards maintain either trespass or ejectment, whatever might have been his rights in that respect when possession was first taken. His claim was converted into a claim for compensation: *Welland v. Buffalo and Lake Huron R. W. Co.*, 30 U. C. R. 147; *Galt v. Erie and Niagara R. W. Co.*, 19 C. P. 357.

The assent of the plaintiff to the continuance in possession of his land by the defendants and their possession and construction of their road thereafter, constituted such an agreement for the sale of the land and a part perform-

ance thereof as a Court of equity would have enforced, even though no price was fixed : *Patterson v. Buffalo and Lake Huron R. W. Co.*, 17 Grant 521.

The taking, and, with the assent of the plaintiff, remaining in possession, and the construction, are acts of at least as significant a nature as indicating an intention on the part of the defendants to become the owners of the land, as the giving of a notice to treat, in which latter case a bill can be maintained for specific performance of the agreement thereby created, and the company may be compelled to take the proceedings prescribed by the Act for ascertaining the amount of the purchase money and compensation : *Walker v. Eastern Counties R. W. Co.*, 6 Hare 594.

It was argued that the Statute of Frauds was an answer, inasmuch as the possession of the defendants was not referable to the agreement, the defendants having taken possession by wrong. But in *Jennings v. Robertson*, 3 Grant 513, the contrary was held, where, as in the case before us, the possession was converted into a lawful possession, and improvements were subsequently made with the knowledge of the owner, which could not be referred to the prior wrongful possession.

The parties stood then, in my opinion, in the position of vendor and purchaser as regarded each other, and the only matter which remained to be settled was the amount of compensation to be paid for the lands.

The Railway Act Consol. Stat. C. ch. 66, sec. 11, being the Act to which these defendants are subject, provides that such compensation shall be ascertained *in case of disagreement* between the parties, and it is only in such cases that the notice to treat, being the notice contained in subsec. 7 of sec. 11, becomes necessary.

There being then an agreement enforceable in equity for the purchase of the land, was it necessary in order to the ascertainment of the price that there should be any instrument under the seal of the company, or any resolution entered in the company's books? I am of opinion that it was not. The learned Judge by whom the case was

tried found as a fact, and his finding is supported by the evidence, that the president and secretary had authority from the Board of Directors to ascertain the value of the land.

The case of *Smith v. Dublin and Bray R. W. Co.*, 3 Ir. Chan. 225, cited by Mr. Britton, is an authority in his favour on this point. See also *Watts v. Watts*, L. R. 17 Eq. 217.

The value of the land was accordingly ascertained pursuant to the instructions of the directors communicated to the plaintiff. He agreed to it and prepared a deed granting and conveying it to the company. It appears from the evidence of the defendants' own officers that there was no objection to this deed or to the plaintiff's title, and that the only reason the deed was not accepted was, that the defendants were unable to pay the purchase money.

I think that if the plaintiff had applied to the Court for a mandamus to compel the defendants to take proceedings under the Railway Act to ascertain the amount of compensation, he would have found some difficulty, on the facts disclosed at the trial, in shewing that there was any necessity for the writ.

A sufficient deed of the land having been executed and delivered and tendered to the defendants, I am of opinion that the present action is sustainable. After all that has been done, the defendants themselves hardly disputing the plaintiff's right except, as may be inferred, at the instance of some third person, we ought to uphold the verdict if upon any tangible ground we can do so.

As to interest. I think the plaintiff is entitled to that also. As I have already pointed out, he assented to the defendants retaining possession very shortly after they took it, and *Rhys v. Dare Valley R. W. Co.*, L. R. 19 Eq. 93, is a very satisfactory authority in his favour as to this part of his claim.

Upon the deed to the defendants, which was produced as an exhibit at the trial but which I do not find among the papers, being returned, the rule should be discharged.

WILSON, C. J., and GALT, J., concurred.

Rule discharged.

LEE, ADMINISTRATOR OF LAWLOR, DECEASED V. THE BANK OF BRITISH NORTH AMERICA.

Deposit receipt—Endorsement—Payment after death of depositor without notice—Effect of death as revocation of authority to pay—Pleading.

Action by plaintiff as administratrix of one L., to recover the sum of \$100 deposited by L. in his lifetime with defendants.

Second plea: That the moneys were claimed under a deposit receipt, which, after L.'s death and before defendants had any notice or knowledge thereof, was duly presented to defendant's properly endorsed by L., and defendants in due course of business and in their usual mode of dealing with such receipts, paid the sum mentioned therein to the person presenting the same with L.'s indorsement thereon, and defendants took up and ever since held the same, as they were entitled to do.

Third plea: After stating that the moneys were claimed under the deposit receipt, alleged that L. in his lifetime endorsed and delivered said receipt to B. L., his wife and afterwards his widow, who being possessed thereof by virtue of the endorsement, presented it to defendants, who without any notice or knowledge of L.'s death, duly paid the same to her.

Held, second plea bad, for there was no allegation of the delivery of the receipt, or of any intention to pass the property therein, the expression "indorse," which in negotiable instruments, imports a delivery and transfer to the endorsee so as to pass the title thereto, having no such effect in a non-negotiable instrument of this character; further, that the allegation of payment in ignorance of L.'s death, and in due course of business, &c., could not help defendants, and the plea should have alleged a payment to L.'s personal representative or to some person shewing a right to the money.

Held, also, third plea bad: That it did not constitute a good legal defence, for, notwithstanding the alleged endorsement and delivery, the depositor still continued entitled to the money; neither did it constitute a defence in equity, for it alleged neither an equitable assignment of the receipt or of the money secured thereby, nor a *donatio mortis causa*, nor a gift thereof.

DECLARATION: That in consideration that John Lawlor, deceased, in his lifetime would deposit in the defendants' bank the sum of \$100, the defendants promised and agreed to pay to him, on his giving them 15 days notice requiring the same, the said sum with interest, &c.; averring that Lawlor, in consideration of the promise, deposited the \$100 in the defendants' bank, upon the terms aforesaid: that he died intestate, without having given notice requiring the said moneys or having been paid the same: that plaintiff being the administrator became entitled to the moneys and

gave the required notice, but the defendants refused to pay, &c.

Second plea : that the moneys claimed, are claimed under the deposit receipt, and not otherwise ; and further that the said receipt was, after the death of Lawlor and before the defendants had any notice or knowledge of his death, presented at the office of the defendants properly endorsed by the said Lawlor, and that the defendants, having no notice or knowledge of such death, in due course of business, and in their usual mode of dealing with such deposit receipts, paid the sum mentioned therein to the person who presented the same with the endorsement of the said Lawlor thereon, and took up and have ever since held the same as their own, as they were entitled to do.

Third plea : that the moneys claimed are claimed under the deposit receipt only, and not otherwise, and that Lawlor in his lifetime duly endorsed and duly delivered it to one Bridget Lawlor, his wife, and afterwards his widow, and that Bridget Lawlor, being properly possessed of the receipt by virtue of the endorsement, presented it at the office of the defendants, who, without knowledge or notice of the death of Lawlor, duly paid the same to her.

To these pleas the plaintiff demurred on the grounds :

To the second plea, (1) that the death of Lawlor was a revocation of the endorsement, and the defendants' want of knowledge or notice of the death did not justify them in paying it to a person not entitled to receive it ; (2) that the mere endorsement did not entitle the person in possession to receive the money.

To the third plea : that the death was a revocation of the alleged endorsement, and the absence of notice to the defendants did not justify payment to any one except the legal personal representative ; the mere endorsement of the receipt by Lawlor did not entitle the person in possession after his death to payment of the money : that there could not in law be any holder of the receipt except the personal representative of Lawlor, and it is not alleged that

the person in the plea called "the holder" was such personal representative; that even if an assignee of Lawlor of the receipt and his interest and property therein could be a holder, there is no allegation in the third plea that the person to whom the payment was made was such assignee.

The case was set down for argument before a single Judge, and was ordered by him to be heard before the full Court.

In this term, August 30, 1879, the demurrs were accordingly argued.

Ferguson, Q. C., for the demurrer. The deposit receipt is not negotiable so as to entitle the person in possession of it, by virtue of Lawlor's endorsement thereon, to claim payment from the bank of the money deposited. The only person who can claim payment is Lawlor's personal representative: *Mander v. Royal Canadian Bank*, 20 C. P. 123; *Sibree v. Tripp*, 15 M. & W. 23; *Daniel on Negotiable Instruments*, 2nd ed., vol. ii., p. 569-71, sec. 1618a. Assuming, however, that the endorsement had the effect contended for, it was revoked by Lawlor's death, and the payment by the bank in ignorance of his death is no answer: *Morse on Banks and Banking*, 260; *Tate v. Hilbert*, 2 Ves. jr. 118, 4 Bro. C. C. 291. See also *Bank of Montreal v. Little*, 17 Grant 313, 685; *Bromley v. Brunton*, L. R. 6 Eq. 275; *Re Beak's Estate*, *Beak v. Beak*, L. R. 13 Eq. 489; *Amis v. Witt*, 33 Beav. 619, 1 B. & S. 119. The defendants admit that the transaction does not come within the 29 Vic. ch. 28, secs. 23, 24, relating to powers of attorney, or the 35 Vic. ch. 12, secs. 1, 3, relating to assignment of choses in action, as it took place before the passing of these Acts.

McMichael, Q. C., contra. In *Daniel on Negotiable Instruments*, 2nd ed., vol. ii., p. 642, sec. 1703, it is laid down that deposit receipts are negotiable when expressed in negotiable words; and the form of this receipt is such as to make it negotiable. The case of *Mander v. Royal Canadian Bank*, 20 C. P. 123, although deciding

that the deposit receipt there in question was not negotiable, at the same time stated that there may be a valid equitable assignment of the receipt and of the moneys secured by it. The pleas here set up a good equitable assignment. If Lawlor had sued in his lifetime the facts set up would have constituted a good defence against him. Lawlor's death was not a revocation of the authority to pay, the payment having been made, as is alleged in the pleas, without any notice or knowledge of the death, and in the due course of business, and in defendants' usual course of dealing with such deposit receipts: *Daniel* on Negotiable Instruments, 2nd ed., vol. ii., p. 569, sec. 1618a; *Tate v. Hilbert*, 2 Ves. jr. 118, 4 Bro. C. C. 291.

September 17, 1879. Osler, J.—In *Mander v. Royal Canadian Bank*, 20 C. P. 123, it was held that an instrument very similar to that declared on in this action was not negotiable, either at law or in equity, so as to entitle the holder to demand payment of the fund secured by it. But in that case a plea for defence on equitable grounds was held to be good, which averred in substance that the plaintiff had for good and valuable consideration transferred all his right, title, and interest at law and in equity, by endorsement on the receipt and delivery to the persons named in the plea to receive and demand payment of the fund, with the intention of passing to such persons all his right and title to the money represented by the receipt, which money the defendants had paid over to the transferee.

The second plea in this case assumes that but for the death of Lawlor the bank would have been discharged by payment of the money secured by the receipt to the person presenting it with his endorsement, and seeks to avoid the effect of his death upon the legal right of such person by an averment that they paid the money without notice of the death. The plea therefore must shew a good answer to a demand by Lawlor himself, if the action had been brought by him. In that respect it falls far short of the

plea in *Mander v. Royal Canadian Bank*. It alleges only that the receipt was properly endorsed (whatever that may mean) by Lawlor, the owner of it, and that the defendants, in due course of business, and in accordance with their (or the) usual mode of dealing with such deposit receipts, paid the sum mentioned therein to the person who presented the same with Lawlor's endorsement. It is not even alleged that Lawlor delivered the receipt to the person who presented it, and to whom it was paid, or that he ever intended to pass the property in the receipt or the money secured by it. The expression *endorse* used in reference to negotiable instruments, those at least payable to order, imports a delivery and transfer to the endorsee so as to pass the title ; but it cannot bear the same meaning when used in reference to an instrument which is not negotiable, and the allegations in the plea that the payment was made in due course of business, and in accordance with *the* usual mode of dealing, (to read the plea in the most favourable manner for the defendants) do not, in my opinion, help them, for to apply the language of Lord Selborne in *Goodwin v. Robarts*, L. R. 1 App. Cas. 476, 494, conversely to the facts of this case, the deposit receipt is "one of those contracts in writing which have their nature, incidents, and effects, defined and regulated by British law, so that a Judge in a British Court is bound, without evidence, to know whether (and how, if at all) they are legally transferable, and to reject any evidence of a customary mode of transfer at variance with the law."

In *Dixon v. Bovill*, 3 Macq. Sc. App. 1, Lord Chancellor Cranworth said, at p. 16, "The law does not * * enable any man by a written engagement to give a floating right of action at the suit of any one into whose hands the writing may come, and who may thus acquire a right of action better than the right of him under whom he derives title." And it was held that usage could not make the document, there in question, an "Iron scrip note" negotiable by delivery.

So in *Crouch v. Credit Foncier Co.*, L. R. 8 Q. B. 374, it was held that a debenture containing a promise to pay a sum of money and interest was not a negotiable instrument, and that a custom of trade to treat it as such could not be set up against the general law.

To the same effect is *Partridge v. Bank of England*, 9 Q. B. 396, 421, in which a custom to pay dividend warrants to the parties presenting them was expressly pleaded and expressly found, but the validity of such a custom was denied, and the warrant held not negotiable.

There are many other cases to the same effect, most of which are collected in the case of *Goodwin v. Robarts*, L. R. 1 App. Cas. 476 above referred to.

I think the second plea is bad, and contains no answer at law or in equity to the plaintiff's demand, because it does not allege a payment to Lawlor or to his personal representative, or to some other person who had a right to the money.

The third plea alleges that Lawlor in his lifetime duly endorsed and delivered the receipt to his wife, Bridget, who being properly possessed of the receipt by virtue of the endorsement, presented it after his death to the defendants, who without notice or knowledge of the death paid it.

The defendants here widen their ground of defence a little, though still confining it within narrow limits.

It was conceded that the transaction in question occurred several years ago, and before the passing of the Acts now consolidated as R. S. O. ch. 95, secs. 14, 15, relating to powers of attorney, and R. S. O. ch. 116, secs. 6, 7, assignment of choses in action, even if they could otherwise have had any application to it.

I think this plea cannot be supported as a legal plea, for notwithstanding the alleged endorsement and delivery of the deposit receipt, the depositor remained, and the plaintiff, as his representative, is now the undoubted legal creditor of the defendants.

Then does it set up a payment good in equity as against either of them ?

The facts upon which the defence is rested seem to be the endorsement and delivery, or the delivery alone, by Lawlor to his wife of the receipt in question, and the payment by the bank of the same to her on its presentation without notice of Lawlor's death. The defendants do not plead an equitable assignment of the debt. They only allege that by virtue of the endorsement, (not attributing in this part of the plea any effect to the delivery), Bridget Lawlor was properly possessed of the receipt. Nor do they allege that Lawlor intended by the endorsement or delivery, or either of those acts, to transfer to her the right to receive the money mentioned in the receipt, or the whole or any interest therein. In short they do not shew how her possession of the receipt entitled her to the money.

In *Amis v. Witt*, 1 B. & S. 109, 33 Beav. 619, it was held that such an instrument as the one here in question could be the subject of a *donatio mortis causa*. This was followed in *Moore v. Moore*, L. R., 18 Eq., 474.

In *Veal v. Veal*, 27 Beav. 303, the Master of the Rolls held, following a decision of Sir John Leach in *Rankin v. Weguelin*, 27 Beav. 309, that a promissory note payable to order, but not endorsed, could also be the subject of such a gift.

The present case, however, is not put on any such ground. If it could have been, the cases shew that the payment of the money to the donee would have been an answer to the claim of the executor. "I apprehend that in a case where a *donatio mortis causa* has been carried into effect by a Court of equity, the Court of equity has not considered the interest as vested by the gift, but that the interest is so vested in the donee that that donee has a right to call on, and, as to the personal estate, to compel the executor to carry into effect the intention manifested by the person he represents :" Per Lord Eldon, in *Duffield v. Elwes*, 1 Bligh N. S. 497, 534. The defendants here therefore in paying the deposit receipt would only have done what the donee could have required the executor to aid her in compelling them to do if the gift had been

causa mortis. But no such relief can be given where there has been only an ineffectual voluntary gift *inter vivos*, and a Court of equity will not interfere to complete the title of the donee: *Dillon v. Coppin*, 14 My. & Cr. 647; *Jefferys v. Jefferys*, 1 Cr. & Ph. 138.

The position of a voluntary assignee of a chose in action not negotiable was much discussed in *Gott v. Gott*, 9 Grant 167, decided in 1862 by the late Chancellor VanKoughnet. The instrument in question there was a church debenture.

In *Williamson v. Thomson*, 16 Ves. 443, 450, it was held that where the effect of the endorsement of securities even to a creditor of the endorsee was not such as to pass the property at law, the transaction would not be aided in equity unless a distinct intention to make an appropriation of such securities was unequivocally made out.

In *Richards v. Delbridge*, L. R. 18 Eq. 11, Hall, V. C., says, speaking of a case of voluntary gift: "A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or in trust, as the case may be; or the legal owner of property may, by one or other of the modes recognized as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward in trust for the other person." He then quotes from the judgment of Lord Justice Turner, in *Milroy v. Lord*, "If it," the gift, "is intended to take place by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust."

See also *Moore v. Moore*, L. R. 18 Eq. 474.

If then the third plea shews neither an equitable assignment, nor a *donatio mortis causa*, nor a gift *inter vivos* of

the money secured by the deposit receipt in question, I do not see how the defendants have discharged themselves from their liability to pay it to the depositor or his legal representative.

If it is assumed in favour of the plea that there was an imperfect voluntary gift of the deposit receipt, and I think the plea falls short of alleging even that, yet as neither the legal nor equitable title to the money passed to the transferee of the receipt, inasmuch as the instrument was not a negotiable one, it is doubtful if the defendants were, even as against Lawlor, justified in paying it.

If this be so, and we have been referred to no authority to the contrary, the fact that it was paid to the transferee after Lawlor's death without notice cannot help them.

Such a case as the present is different from that of the cheque in *Tate v. Hilbert*, 2 Ves. J. 118, 4 Bro. C. C. 291, where it is said that if the banker pays the cheque after the death of the drawer, without notice, it might be a good payment. The drawer of the cheque gives an order on the banker to pay the money, which is also an order to the holder to obtain payment of it. There is nothing more to be done by him, and it is not unreasonable to say that if the banker pay such an order after the drawer's death, without notice, he should be protected. But the mere endorsement and delivery of a document of title, such as that now in question, without more, does not transfer the debt, and, in my opinion, does not confer any authority to pay it.

Even if it could be said that there was, under such circumstances, an order upon the defendants to pay or a power to Bridget Lawlor to receive the money, it was a mere naked power not coupled with an interest: *Hunt v. Rousmanier*, 8 Wheat. 174; and was countermanded by the death of Lawlor; *Smyth v. Craig*, 3 Watts & Serg. 14, 20; *Mansfield v. Mansfield*, 6 Conn. 559.

The observations of the Lord Chancellor, in *Tate v. Hilbert*, as to the effect of payment without notice of the death, appear to have been made with special reference to the nature of the instrument there in question, a cheque.

I have been able to find no authority for holding that the common law rule as to the effect of the death of the principal upon the authority of the agent has been broken in upon to such an extent as to say that the absence of notice protects the defendants in this case: *Lepard v. Vernon*, 2 Ves. & B. 51; *Mitchell v. Eades*, Prec. in Ch., 125; *May's Fraudulent and Voluntary Conveyances*, 381, 396, 414: *Johnson v. Spies*, 5 Hun. N. Y. 468.

Probably neither Lawlor nor the plaintiff could maintain an action of trover to recover the receipt. That, however, is very different from saying that the right to the money represented by it was transferred. If possession of the receipt be necessary to enable the plaintiff to maintain the action, he may find a difficulty in his way: *Barton v. Gainer*, 3 H. & N. 387; *Rummens v. Hare*, L. R. 1 Ex. D. 169; *Bank of Montreal v. Little*, 17 Grant 685.

In my opinion the plaintiff is entitled to judgment on the demurrer to the third plea also.

WILSON, C. J., and GALT, J., concurred.

Judgment for plaintiff.

KNEESHAW V. COLLIER ET AL.

Promissory note—Duress—Consideration—Compromise of criminal charge.

The defendant C. being in prison in due course of law on a charge of assaulting the plaintiff, for which an indictment was laid against him charging him with an assault occasioning actual bodily harm, and with common assault, and a civil action for the assault having also been brought against him, a settlement was affected by defendant C. giving a note endorsed by defendant B., for \$1,000 for the damages sustained by plaintiff, which was held not to be disproportionate to the injury sustained, and a fine was inflicted for common assault merely, the former charge in the indictment being withdrawn. The settlement was made and the note accepted by plaintiff at defendant's instance, and under the sanction and advice of his counsel, without plaintiff having urged it or taken advantage of the imprisonment to procure it, and the Judge, in sentencing defendant, forebore to imprison because defendant had made compensation to the plaintiff. To an action on the note, the defendants set up fraud, duress, and illegality of consideration.

Held, that the plaintiff was entitled to recover: that there was no evidence of fraud; nor under the circumstances could there be deemed to be duress; and further, that there was no illegality of consideration, for the settlement was merely of the plaintiff's private damage, and in no way effected the public interest, the law having been vindicated by the imposition of substantial punishment.

DECLARATION on a promissory note for \$1,000, made by the defendant Collier, and endorsed by the defendant Beaty.

Pleas:—

By the defendant Collier.

1. That he was induced to make the note by the fraud of the plaintiff.

2. That he was induced to make it by duress of the plaintiff, that is to say, by the plaintiff unlawfully imprisoning and detaining him in prison until he made the said note.

By the defendant Beaty.

3. That he was induced to make the note by fraud of the plaintiff.

By both defendants.

4. For a defence on equitable grounds, that shortly before the note sued upon was given, the plaintiff falsely charged before the Police Magistrate of the city of Hamilton that the defendant Collier did, on the 25th

May, 1878, unlawfully and feloniously cut and wound the plaintiff, with intent to do grievous bodily harm to the plaintiff, and thereupon caused the defendant Collier to be arrested and brought before the Police Magistrate, and to be arraigned upon the said charge, and to plead thereto : that he pleaded not guilty, and elected to be tried by a jury : that the plaintiff thereupon caused certain persons to be sworn to give evidence on the charge, and falsely and fraudulently caused them to represent to the magistrate and the defendant, and caused them to understand that the defendant had grievously and very seriously injured the plaintiff and disfigured him for life, and that the plaintiff was in a very weak state and confined to bed from the effect of the injuries, and would be unable to attend to give his evidence for three days thereafter ; and thereupon the plaintiff caused the examination before the magistrate to be adjourned to the 28th of May, and though the defendant was ready and offered to give bail, the plaintiff caused the bail to be refused, and caused the plaintiff to be remanded to gaol, and caused the defendant to be imprisoned until the said 28th May : that while the defendant was imprisoned the plaintiff commenced an action at law for the alleged injuries, claiming \$20,000 : that on the 28th May, the plaintiff caused the defendant to be again brought up before the magistrate and appeared and gave evidence upon the charge, and falsely and fraudulently, by his conduct and demeanour, pretended and represented to the magistrate and to the defendant that he was still suffering from the injuries, and that the defendant had in fact permanently so disfigured him, and caused other persons to give evidence against the plaintiff upon the charge, and caused him to be committed for trial thereon, and again caused the magistrate to refuse bail, and caused him to be imprisoned until the 30th May : that on the 25th May, and thence until the making of the note, the plaintiff was, as the defendant knew, expecting the immediate arrival in Hamilton of his wife and young children, one of whom was just recovering from a severe

attack of diphteria, and was still in a dangerous condition and required great care: that defendant's wife was in a very delicate and precarious state of health, and defendant was apprehensive that his wife would arrive and find him imprisoned on the said charge, and would be thereby thrown into a state of anxiety and excitement which would very seriously affect her health, and that she would be unable without the assistance of the defendant to give their child proper attention, and that the child would die, all of which the plaintiff knew; and the defendant, on the 29th May, applied to the County Judge to be admitted to bail, but the plaintiff opposed it, and falsely and fraudulently represented to the Judge that he had been brutally injured, &c., and thereby caused and procured the Judge to refuse bail: that on the 30th May, the plaintiff caused the defendant to be indicted for assault and battery (setting forth an indictment for a common assault), and caused the defendant to be brought under arrest to be arraigned before the County Judge: that while the defendant was imprisoned and under arrest in the court house, and before arraignment, the plaintiff caused his solicitor to come to him and urge him to compromise the claim for damages and to pay \$2,000 in settlement, and falsely and fraudulently caused the solicitor to represent to the defendant that he had permanently injured and disfigured the plaintiff; and the plaintiff's solicitor said to defendant that if he would give that sum he would almost guarantee that he would procure the Judge, before whom the defendant could be forthwith tried, to let defendant off for a small fine without imprisonment, but if defendant did not settle he would be convicted and sentenced to a long term of imprisonment: that the defendant was refused permission to see the plaintiff, and after further conversations and negotiations between the solicitor and the defendant, it was agreed that the defendant should give his note for \$1,000 and pay the plaintiff's expenses, and the plaintiff should do all he could to obtain the defendant's release, and should accept the note in full satisfaction and discharge of all causes of action then in

existence between the parties; and the defendant thereupon made the note; and, save as aforesaid, there never was any value or consideration, &c. The plea then alleged that the defendant believed all the alleged representations to as the nature of the plaintiff's injuries, and feared that if he did not settle the claim he would be imprisoned, &c., and being thrown into a state of great alarm and sorrow by so grave a charge, and by his apprehensions and fears for his wife and child, and being intimidated and overpowered by the plaintiff's threats, he was anxious by any means to avert the calamities that threatened him, as the plaintiff well knew; and the plaintiff, well knowing all the aforesaid matters, and the defendant's state of mind, and well knowing, as the fact was, that he had only been very slightly and for a short time disfigured, imposed upon, oppressed, and intimidated the defendant, and by false and fraudulent representations procured the note in question. The plea ended by praying that the agreement might be set aside and rescinded, and the plaintiff allowed to proceed with his action, which was still pending.

The case was tried before Patterson, J.A., and a jury, at Hamilton, at the Spring Assizes of 1879.

The defendant began and called witnesses in support of the pleas.

The facts, as disclosed at the trial, appeared to be that on the evening of the 24th May last, the defendant Collier committed a violent assault upon the plaintiff by striking him a blow in the face, the effect of which was to fracture his nose in three places, and to knock him down. A few hours afterwards, the plaintiff laid an information before the police magistrate, in which he charged the defendant with having unlawfully assaulted and struck him. The defendant was arrested, and on the following day was brought before the magistrate, and charged in the caption of the depositions with having unlawfully and feloniously assaulted, cut, and wounded the plaintiff, with intent to do him grievous bodily harm. The plaintiff was not present.

The magistrate was called, and stated that the plaintiff

impressed him with the idea that he had been struck with a great deal of severity, but he did not think that there was anything in his conduct different from that of any other witness.

As to refusing bail, he said: "I thought the charge a very serious one. I thought it my duty to refuse bail. I think all that was said was whether I should admit him to bail or not, and I said I could not. I did not think I had power. If the evidence is very slight, then you may admit to bail. The evidence influenced me (*sic*) that he was grossly assaulted, and therefore that the County Judge was the proper person to bail. I committed him. * *

It was said at the time that he was from the States."

On being asked who instructed him to charge the man, when the plaintiff was not before him, with an aggravated assault, the magistrate said: "I think there were one or two lawyers there. Mr. Holden was one. Mr. Holden appeared as lawyer and witness. * * I think he appeared as both. He interested himself the same as any other professional man would who saw one of his servants assaulted." (Mr. Holden was president of the Mechanics' Institute, of which the plaintiff was secretary.) "He interested himself till after plaintiff was able to come out. Mr. MacKelcan, Q.C., appeared for Collier."

The defendant was then called, and described the difficulty which led to the assault. He said: "I struck him. I intended to hit him a hard blow." (It was said that this was a mistake of the reporter, and that what the witness said was, I did *not* intend to hit him a hard blow. This is rather borne out by a subsequent passage in the examination, in which the witness repeats the expression, inserting the word *not*.) "I did not hit him harder than I intended to. He fell back in his chair. He took his cane to strike me * * and went out. I did not see him again till about three days afterward in the Police Court. * * I was arrested. * * I got Mr. MacKelcan as counsel. Mr. Holden was there. He took an active part. I could not tell whether he was counsel, witness, or prosecutor. * *

The doctor was examined. * * Dunn was examined. After Dunn was examined, I was sent to gaol. My counsel applied for bail. It was refused. The third day after I was brought up again. The plaintiff gave evidence then. He appeared standing in the box, first giving his evidence in rather a faint manner, evidently shewing signs of great weakness. A chair was given him. He sat down holding his nose. He was evidently shewing signs of pain, but there were no discolourations that I could see. There were plasters on his face. He appeared very weak. He spoke faint. * * Application was made by my counsel for bail. * * It was refused. I was sent to gaol. The same day another application was made to the County Judge, and that was refused. * * The next day after I was sent back I received a summons for \$20,000 at Mr. Kneeshaw's suit. I then had a conversation with my counsel as to getting out. I told him I believed they were making a money job of it, and to work the best plan he could to get me out, as I expected my wife and family soon. * * Next I was brought to this court house, and a compromise made. A constable brought me. The plaintiff's counsel, a Mr. McQuesten, called on me there. * * My own counsel was by. The summons was mentioned. * * The conversation began as to how much I was willing to give in order to be released from gaol. McQuesten assured me he could—at least he thought he could—fix it all right so that there would be little more than just a small ordinary fine for a simple assault if it was settled amicably. I asked first to see the plaintiff. They would not let me. McQuesten said the plaintiff was still in a very dangerous condition. I wanted to apologise. * * We got into a sort of dicker in the other room from \$3,000 to \$2,000, and then to \$1,500. I told them I had no money, * * and finally to \$1,000. Then the question as to security came up. * * I gave my reasons why I was doing this. They were that my wife and two little children were coming on : that I had received a telegram, a couple of days before, that one of them had been

ill, and had been given up by the doctors, and I would not have her come on and catch me here for \$10,000. I told him the condition of my family, and that my wife had been left by the servants because of the contagious disease.

* * * The thing was settled with that understanding—that I was to give my note for \$1,000. I gave it because it was a matter of compulsion. I had to do it or stay in gaol. McQuesten seemed to sympathize with me. He said that in case there was no settlement it was a heavy crime, and the Judge could send me to the penitentiary. That was about all he said. He told me that if I did give the note he would see the Judge and try and get him and the Crown counsel to accept a plea for a smaller offence. I think he said I was charged with aggravated assault. * * * My counsel said that the Judge could fine me and send me to prison, but that it was not likely he would do so if I effected a settlement. * * * After it was done we went over to the Judge's Chambers. There was an indictment read to me. My counsel moved that the former charge should be struck out, and that I should plead guilty to common assault, which was accepted by the Judge. I pleaded not guilty to the first count, and guilty to the common assault. I was fined \$100 and costs, and bound to keep the peace. Then I was set at liberty. Kneeshaw did not appear. I saw him on the street a few days after.

* * * His nose was good then as it is now.

On cross-examination he said: * * * I mostly followed Mr. MacKelcan's advice in the matter. When I found I could not get out of it any other way, I told him to settle it for money. I told him I would not stop in gaol for \$20,000. I told him to settle it for any reasonable amount.

* * * I do not know whether the settling of the criminal case had anything to do with the settlement of the civil case. I told Mr. MacKelcan to go and see the plaintiff, and see if his injuries were as bad as reported. I think he said he had seen him. * * * The County Judge told me that he understood I had made ample compensation to the parties, and therefore that he would not impose any impri-

sonment upon me. * * I think my counsel arranged the meeting (at the Court House) with Mr. McQuesten at my suggestion. * * The reason I was willing to give such a large sum was, that I had heard that the plaintiff had been nearly killed. I did not hear it first from McQuesten, but from others who came down to the gaol.

W. J. Kellogg deposed that he saw the plaintiff, immediately after the assault, passing out of the hotel : that he saw him, perhaps three or four days after that, pass the hotel : that he could not exactly say how long : that he thought, but was not positive, that he saw him getting out of a hack without assistance before the settlement.

Photographs of the plaintiff, taken before and after the assault, were put in.

A copy of the indictment before the County Judge was put in. The first count was for assault, occasioning actual bodily harm. The second, for a common assault.

And also a copy of the record of trial, conviction, and sentence on the latter count.

It appeared that the note was to be secured by the deposit of certain railway bonds, and that these bonds were handed over by the defendant's counsel to the plaintiff's attorney on the day after the trial. The defendant said he supposed they had been given up before he was discharged.

At the conclusion of the defence, the learned Judge said that he was unable to see that there was any evidence to go to the jury in support of the pleas, and he directed a verdict for the plaintiff for \$1,024.

In Easter Term, May 22, 1879, *Robertson, Q.C.*, obtained a rule *nisi* to shew cause why the verdict should not be set aside and a verdict entered for the defendants, and for an order under the fourth or equitable plea to set aside or rescind the agreement and compromise set out therein, and ordering the note to be delivered up ; or why a new trial should not be granted, on the ground that there was evidence to go to the jury of the truthfulness of the

defendants' pleas, and the Judge should not have withdrawn the case from the jury: that there was ample evidence to warrant a verdict for the defendants.

In this term, September 4, 1879, *Osler*, Q. C., shewed cause.

Robertson, Q. C., contra.

The argument and cases cited sufficiently appear from the judgment.

September 17, 1879. *OSLER*, J.—The fourth plea in this case affords another instance of the way in which the name of equitable pleading is abused. There is no strictly equitable defence set up in it at all, and the record has been encumbered with a rambling statement of evidence, which should have been struck out in Chambers. Densely concealed in it, however, three legal defences may be discerned, viz.: 1. A general defence of fraud. 2. Duress of imprisonment. 3. A plea of illegal consideration.

After a careful examination of the evidence and the authorities, I agree with the learned Judge at the trial that none of the pleas have been proved.

As to the plea of fraud, there is no evidence which applies to it more than to the other pleas, so that I shall make no further observations upon it.

Next as to duress. I think there was no such duress proved as avoids the contract.

"If a man be imprisoned by order of law, the plaintiff may take a feoffment of him, or a bond for his satisfaction, and for the deliverance of the defendant, notwithstanding imprisonment: for this is not by duress of imprisonment, because he was in prison by course of law; for it is not accounted in law duress of imprisonment, but where either the imprisonment, or the duress that is offered in prison, or at large, is tortious and unlawful; for *executio juris non habet injuriam*:" 2 Inst. 481; Bac. Abr. 7th ed., vol. ii., p. 771. But if a legal imprisonment be made the means of exacting against the defendant's agreement and will, an obligation which has nothing to do with the

object of the imprisonment, he may avoid it by duress: Bac. Abr., vol. ii., p. 771; 9 Vin. Abr. 317, tit. Duress (B.) pl. 1.

Now here the defendant was in prison by due course of law on the charge of assaulting the plaintiff, and the note which he signed, and which is the subject of this action, was given to secure the damage which the plaintiff had sustained because of that assault. But it may be said that the claim for damages was not the purpose of the imprisonment, and therefore that the case comes within the exception referred to. The answer to this is, that the evidence shews that the imprisonment was not made use of by the plaintiff as a means of exacting the note. The plaintiff, so far as it appears, exerted no pressure on the defendant and made no attempt to procure anything from him. The latter was the moving party. The compromise (to give it that name) was brought about at his suggestion, and it was at his pressing instance that the plaintiff intervened, accepted the compromise, (a legal one, as I shall hereafter shew,) and enabled the defendant to escape with a lighter punishment than would otherwise have been inflicted. That he was willing to meet the defendant and settle his claim for damages cannot, in my opinion, be urged against him as amounting to duress, when it is not shewn that he was pressing for a settlement or making use of the imprisonment for the purpose of inducing the defendant to pay extravagant or any damages for the injury he had inflicted. It is to be observed, too, that the defendant had from the earliest moment the advice of able counsel, who was present at the interview at which the arrangement now complained of was made. It is natural to suppose that if there was anything in the circumstances which would have shewn that the agreement was not one entirely proceeding from the free will of the defendant, this gentleman's evidence would have been extremely important for him, yet he was not called.

On this subject the learned and instructive judgment of Proudfoot, V. C., in *Armstrong v. Gage*, 25 Grant 1, may

be referred to. See, also, *Boddy v. Finley*, 9 Grant 162; *Williams v. Bayley*, L. R. 1 H. L. C. 200.

It was strenuously urged by Mr. Robertson that the large amount for which the note was given was a convincing proof that the plaintiff had taken advantage of the defendant's situation to extort heavy damages utterly disproportionate to the injury inflicted, and he asked that the matter should now be opened and the damages assessed by a jury.

Speaking for myself, I must say that I do not think the defendant has any reason to complain of the damages. He appears, from his own evidence and the examination of the plaintiff, taken before the trial, and put in at the trial by the defendant as part of his case, to have been guilty of a violent and unprovoked assault upon the plaintiff, causing him a painful injury and great shock. I do not consider the damages at all out of the way. If the injury which was inflicted on the plaintiff was not so severe as it appeared to be, the defendant might have called the medical men who attended him and given some evidence on that point. In the absence of such evidence, we can hardly assume anything in the defendant's favour in this respect.

Lastly, as to the illegality of the compromise, if that can be called a compromise where not only the private claim for damages was satisfied, but the law was vindicated by the imposition of a substantial punishment. The charge which the plaintiff made was one of assault and battery merely. The magistrate, not at the request but without the knowledge of the plaintiff, so far as the evidence shews, altered it to a charge of felonious assault. The defendant was indicted for misdemeanor only, viz., assault occasioning actual bodily harm, and common assault.

In the first place it is to be observed that there is no plea setting up illegality of consideration by the compromise of a felony, and it is only by giving the fourth, or so-called equitable plea, the most favourable construction for the defendant that we can say that he has pleaded a sufficient plea of compromise of a misdemeanor.

In *Keir v. Leeman* 6 Q. B. 308, and in the Ex. Ch., 9 Q. B. 371, the plaintiff had indicted certain persons for riot and assault upon a constable in execution of his duty in executing a *fi. fa.* against the goods of one of the persons indicted, and the defendants, in consideration that the plaintiff would forbear to prosecute further, agreed to pay the balance of his claim, and, with the assent of the Judge at the assizes, he accordingly forbore to do so. It was held that the agreement was invalid inasmuch as the assault was coupled with a *riot* and obstruction of a public officer.

The Court of Queen's Bench said, at p. 321: "We shall probably be safe in laying it down that the law will permit a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might sue and recover damages in an action."

Mr. Pollock in his work on Contracts, 2nd ed., p. 290, refers to this case as still containing the principal direct authority on the subject.

In the Exchequer Chamber, Tindal, C. J., said, at p. 395: "We have no doubt that, in all offences which involve damages to an injured party for which he may maintain an action, it is competent to him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit. It is said, indeed, that in the case of an assault he may also undertake not to prosecute on behalf of the public. It may be so: but we are not disposed to extend this any further."

In *Coppock v. Bower*, 4 M. & W. 361, the plaintiff had agreed to drop proceedings on an election petition charging bribery, on consideration of being paid a sum of money. The agreement was held to be illegal.

Lord Abinger said, at p. 367: "This is a proceeding instituted not for the benefit of individuals, but of the public—and the only interest in it which the law recognizes is that of the public."

In *Fisher v. Apollinaris Co.*, L. R. 10 Ch. 297, Fisher had been prosecuted by the company for having unlawfully

enclosed mineral water in certain bottles bearing the trade mark of the company. The prosecution was compromised.

Lord Justice James said, at p. 302 : "This is one of those misdemeanors where the person injured has the choice between a civil and a criminal remedy. * * * Offences of this kind are indictable, but it is not against the policy of our law to allow an injured person to enter into a compromise with regard to them."

And Sir G. Mellish said, at p. 303 : "There was no authority for saying that it was wrong in the prosecutors to withdraw from such a charge of this kind. * * Such compromises are constantly made before criminal Courts in cases of assault or libel. In some cases there is a payment of money; in other cases, no payment at all; and it has not been considered that there was anything wrong in such transactions. It would, of course, be different if there was any case alleged of extorting money under threats."

The law has been laid down in the same way in our own Courts.

Dwight v. Ellsworth, 9 U. C. R. 539, was an action brought on a promissory note given upon an agreement to stifle a prosecution for gambling in a tavern. It was held that the consideration was illegal.

Robinson, C. J., said, at p. 540 : "The regulations in question were matters of public interest, not merely affecting the interest of the plaintiff. It is true there was no charge of felony involved; but that is not now the test of illegality. It is equally illegal to stipulate for the compromise of a charge amounting only to a misdemeanor, if the offence is one injurious to the community generally, and not confined in its consequences to the prosecutor himself."

In *Henry v. Little*, 11 U. C. R. 296, an action on a promissory note, to which the plea was, that the note was given in consideration of forbearance to proceed in a prosecution for felony, Sir John Robinson observed, in giving judgment, at p. 298 : "Whether the compromise was illegal or not would depend upon the precise character of the charge. Hayes may, for all that appears, have

charged that as a felony which was no felony, but only such an offence against the person as might, without impropriety, be allowed by the Court to be compromised by making satisfaction. It is every day's experience, that persons even indicted for felonious assault are convicted of common assault. This may have appeared to the Court to have been one of those cases, in which event it might properly be allowed to be compromised, as the learned Judge reports to us it was, by permission of the Court of Quarter Sessions."

The result of these authorities would seem to be that if the transaction in question here is to be looked upon as a compromise of a criminal prosecution, it was a compromise which was not illegal, and would not affect the security which was taken for the plaintiff's damages. It comes distinctly within the class of cases in which such compromises have been held to be lawful.

In this case there is the additional fact that the alleged compromise was made with the sanction of the Court, and a lighter punishment inflicted, because the defendant had made satisfaction to the prosecutor.

Mr. Robertson strongly urged that the present case was governed by such cases as *Morgan v. Palmer*, 2 B. & C. 729, an action to recover back money which had been exacted for fees to which the defendant was not by law entitled; and *Duke de Cadaval v. Collins*, 4 Ad. & E. 858, in which it was held that an action lay to recover back money which had been paid under compulsion of colourable legal process.

The distinction between those cases and the present, as regards the facts to which the law was applied, is obvious.

In my opinion the defendant has not proved a single material allegation in his pleas, and the rule should therefore be discharged.

WILSON, C.J., and GALT, J., concurred.

Rule discharged.

LEWIS ET AL. V. TUDHOPE ET AL.

Insolvency—Proof by surety without payment of debt—Deed of composition and discharge—Proof of claim—Valuing security—Fraud.

The plaintiffs were creditors of the defendants, insolvents, for \$10,800, and not having proved, T., who was security for plaintiffs, without having paid the debt, proved therefor, fearing, as he alleged, that, if compelled to pay, he would have no recourse against the estate. One R., a surety for other creditors, in like manner proved. The proof of these claims was not contested, and a deed of composition and discharge was entered into, which was executed by T. and R., it being admitted that without computing one or the other of these claims there were not creditors to three-fourths in value executing; and on the production to the Judge of the assignee's certificate of there being the proper number and value of creditors executing, the deed was confirmed. The composition was to be paid by instalments, for which the insolvents were to give their promissory notes, and it was provided, in accordance with a stipulation to that effect by the creditors, that the three last payments to the creditors, except T., were to be secured by the assignment of the dividends on the notes to be given to T., and such notes were accordingly assigned by him as such security, and the proceeds thereof applied in meeting a deficiency in such payments. After the deed had been confirmed and the estate handed back to the insolvents, the plaintiffs sent in proof of their claim, valuing their security, which the assignee refused to accept, because the estate had passed out of his hands, and he referred plaintiffs to the insolvents, but nothing further was done. The plaintiffs sued defendants on the common counts for the whole debt, and on a special count for the amount of the composition, alleging neglect in the defendants to give them the composition notes, or pay their debt.

Held, that the plaintiffs could not recover under the common counts, for that the deed of composition and discharge constituted a good defence thereto: and the special replications thereto, set out below, were not proved; for that even if plaintiffs' debt were excluded therefrom there would still be the three-fourths in value of creditors executing; that defendants did not, as was alleged, procure T. to prove so as to defeat the plaintiffs, for that he did it of his own accord for the reason above stated, nor did the giving the notes to T. diminish the proportion each creditor was entitled to, nor had the assignment of the notes as such security the effect of postponing the time of payment of the notes.

Per WILSON, C. J., the fact of the parties, with the knowledge that the surety had not paid the debt, suffering him to rank as a creditor, and the creditors stipulating as the condition of their assent to the composition that the notes to be given to T. should be assigned as such security, &c., and the assignee with knowledge of all these facts untruly certifying to the County Judge, constituted such fraud as would nullify and avoid the deed as against the plaintiffs, and, if necessary, leave should be granted to plaintiffs to so amend their replication as to set up these facts; and also, if by these transactions defendants were unable or less able to pay plaintiffs' composition, the creditors, and all parties to the fraud, should be called upon to make it up.

Per OSLER, J., on a proper construction of the evidence, no such fraud was established.

Held, however, that the plaintiffs were entitled to recover the amount of the composition, after deducting the value of their security: that no demand of the notes was necessary, it being defendants' duty to give them; nor, in case of composition, for plaintiffs to have proved their claim: that what was done by plaintiffs amounted to a specification and valuation of their security, but, if not, defendants under the circumstances should not be permitted to set this up as a defence.

DECLARATION.

1. Common counts.

2. That the defendants by indenture of 15th December, 1875, covenanted with their respective creditors that the defendants would pay to each of them a composition of 33½ cents on the dollar of their respective claims against the defendants in several equal payments at six, nine, twelve, fifteen, eighteen, twenty-one, and twenty-four months respectively from the 23rd of November, 1875, and that the defendants would give to each of their creditors the promissory notes of the defendants for such composition payments, to bear date on the day last mentioned. And the plaintiffs say they were creditors of the defendants at the time the deed was executed to a large sum of money, and that the defendants have not, nor has either of them, given to the plaintiffs the said promissory notes for payment of the composition aforesaid, or for any part of it, but have refused so to do. And although the time has long since elapsed when the promissory notes if given would have fallen due, yet the defendants have not paid the said debt or any part thereof; and all times have elapsed, and all things have happened, and all conditions have been fulfilled to enable the plaintiffs to maintain this action.

Pleas to first count: 1. That the plaintiffs' claim was one due to them as partners, and was not a privileged or excepted debt from the Insolvent Act of 1875, but a debt which is affected by the said Act and by the discharge under its provisions: that after the accruing of the alleged cause of action in the declaration mentioned the defendants became insolvent within the meaning of the said Act; and after that Act, and before the commencement of this suit, a writ of attachment was duly issued out under the said Act

against the estate and effects of the defendants, under which their estate and effects were attached, and the plaintiffs' claim for such debt was duly mentioned and set forth in the statement of the insolvents' affairs, according to the statute; and such proceedings were had that, in pursuance of the provisions of the Act, a deed of composition and discharge was duly entered into and executed by a majority in number of the defendants' creditors who had respectively proved claims against the estate of the defendants to the amount of \$100 and upwards, and who represented more than three-fourths in value of all the claims of \$100 and upwards which had been proved, and such discharge was duly confirmed after notice to the plaintiffs and other creditors of the defendants, and otherwise according to the said Act, by the proper Judge in that behalf, and the defendants by virtue of the said deed of composition and discharge, and the confirmation thereof, and the said Insolvent Act, became discharged of and from the said cause of action.

2. Never indebted.

3. Payment.

To the second count the following pleas were proposed to be pleaded at the trial :—

1. Denial of deed.

2. That the plaintiffs were not creditors.

3. The plaintiffs did not demand, nor did the defendants refuse to give to the plaintiffs, the defendants' promissory notes in pursuance of the terms of the deed.

4. The time has not elapsed in which the notes would have been due, if they had been given.

5. Alleging that in the insolvency proceedings the plaintiffs did not file or prove their claim against the defendants' estate, or with or to the assignee otherwise; and so the defendants say the plaintiffs were not entitled to rank on the said estate or to avail themselves of the privilege or the rights of creditors under the said deed.

6. Alleging that the plaintiffs, as creditors and entitled to prove their claim in the said insolvency proceedings,

held security from the defendants for their said claim, and that the plaintiffs did not specify the nature and amount of such security, nor on their oath, or on the oath of one of them, put a specified value thereon, as required by the said Act, and the amount of the plaintiffs' claim for which they were entitled to rank on the estate of the defendants, and to be paid according to the terms of the said deed.

7. That the assignee, under and in pursuance of the terms of the deed and of the said Act, reconveyed to the defendants their estate and effects, and thereupon, and having discharged his duties as such assignee, he, the said assignee, duly obtained from the proper Court in that behalf his discharge as said assignee of the defendants' said estate; and he thereupon became and was discharged from his said office, and from all power, authority, or concern in or in connection with the said estate or the creditors thereof. And the defendants say that the plaintiffs were creditors of the defendants before the said insolvency, and not otherwise; and that the plaintiffs had not, prior to the obtaining by the assignee of his discharge, filed or proved their claims against the defendants' said estate.

The learned Judge allowed the second and third pleas, but disallowed the remaining pleas, but subject to the opinion of the Court as to what pleas they should think should be allowed.

Issue.

Second replication : setting out the deed of composition and discharge in full, &c. Held bad on demurrer: 27 C.P. 505.

The third replication was held bad on demurrer.

Fourth replication the first plea : that the discharge was obtained by fraud and misrepresentation, in this, that one George Tudhope executed the said deed, and pretended to be a creditor of the defendants when he was not a creditor, but was security to the plaintiffs for the debt due to the plaintiffs by the defendants; and the said George Tudhope has not at any time paid the said debt, and he could not without such payment, and without the consent of the plaintiffs, prove against the said estate

or execute a deed binding as a release upon the plaintiffs; and the plaintiffs have never given such consent; and that without and besides the debt due to the plaintiffs, and fraudulently represented by the said George Tudhope, the said deed was not executed by a majority in number of those creditors of the defendants who had proved their claims for \$100 and upwards, and who represented at least three-fourths in value of the liabilities of the defendants.

Fifth replication to the first plea: alleging that George Tudhope in the said deed mentioned had no claim against the defendants, but was security only for the defendants for the amount set opposite his name in the deed, as the defendants well knew; and that the defendants fraudulently, and with intent to defeat the plaintiffs of their just claim and to prevent them from ranking with the other creditors for the amount of their debt, procured the said George Tudhope to prove for the said amount, being in reality an amount which the defendants did not owe to the said George Tudhope, but for which he was security only, and which he had not paid; and the said promissory notes so given to the said George Tudhope were in excess of the amount really due by the defendants, and so far diminished the proportion which each creditor was entitled to receive. And the defendants, in further pursuance of the said fraud, and to defeat the claim of the plaintiffs, entered into a covenant with the other creditors of the defendants, and induced the said George Tudhope to consent that the said notes which should be given to George Tudhope for the amount for which he had become security to the plaintiffs—and which promissory notes, when they should be given, the plaintiffs were entitled either to receive, or that the same should be held by the said George Tudhope as trustee for the plaintiffs—should be postponed to all the other creditors. And the plaintiffs say that the notes, which were to be thus given in fact for the composition due to the plaintiffs, were postponed by the fraudulent agreement aforesaid, and in consequence the plaintiffs were not

enabled to rank *pari passu* with the other creditors, and that as to the plaintiffs the said deed is fraudulent and void, and cannot be a bar to the recovery of the plaintiffs' claim.

Rejoinders : 1. To second replication, held bad on demurrer : 27 C. P. 505.

2. Issue upon fourth replication.

3. To fourth replication, held bad on demurrer : 27 C.P.505.

The issues for trial were :

Upon the common counts.

First plea, and joinder of issue upon it ; fourth replication, and joinder of issue upon it ; fifth replication, and joinder of issue upon it.

Second plea, and issue.

Third plea, and issue.

Upon the special count, the pleas to it, two and three, the others having been as before mentioned disallowed at the trial.

The cause was last tried before Osler, J., at Toronto, without a jury, at the last Spring Assizes of 1879.

The evidence of the assignee in insolvency, A. J. Allport, was as follows :

Exhibit 1 is the deed of assignment by the defendants in insolvency, dated 27th October, 1875, to the witness as official assignee. It was made under a writ of attachment.

Exhibit 2 is a notification by the assignee, dated the 27th of October, 1875, to the creditors of the deed of assignment having been made, and that a meeting of creditors would be held at the assignee's office, in the town of Orillia, on the 23rd of November, 1875, at one o'clock p.m., to receive statements of their affairs, and to appoint an assignee, if they saw fit.

There was a list of creditors' claims direct and indirect for \$100 and upwards, also contained in the notice, an approximate estimate, as the assignee said in his evidence, in which the plaintiffs' names appeared as follows : "Lewis & Son, Rice, Toronto, \$10,800," and George Tudhope's name as follows : "Tudhope, George, Rugby, \$2,095.32. The aggregate claims under \$100 were stated to be \$1,066.16.

Exhibit 3 contains the minutes of the meeting of the 23rd of November, so called. The plaintiffs and George Tudhope were then present. George Tudhope was appointed chairman of the meeting. The official assignee was appointed the creditors' assignee. George Tudhope and H. S. Scadding were appointed inspectors of the estate. There was an examination of the insolvents, and the reception of a statement of the position of the estate. The insolvents made an offer of composition. It was approved subject to the approval of the creditors at a meeting to be held on the 15th of December thereafter.

Exhibit 4 is a notice, dated the 23rd of November, 1875, to the creditors, sent by the assignee, that a meeting of the creditors would be held at Orillia at one o'clock p.m. on the 15th of December next, to take into consideration the offer of composition of the insolvents, which was as follows :

"We do hereby offer to purchase our insolvent estate, as per schedule filed with our statement, and to pay our creditors thirty three and one third cents in the dollar on their claims, to be paid as follows : by seven equal instalments, at six months, nine months, twelve months, fifteen months, eighteen months, twenty-one months, and twenty-four months from this date.

"Dated at Orillia this 23rd day of November, 1875.

"W. R. TUDHOPE.

"JAMES TUDHOPE."

The witness said that a copy was furnished to each creditor, and amongst them to the plaintiffs.

Exhibit 5 is the statement of the minutes of the meeting of the 15th of December. George Tudhope among others was present, the plaintiffs were not. The offer of the insolvents was accepted, "and that the three last payments be secured to the creditors by the assignment to the assignee of all dividends accruing to George Tudhope upon his claims upon the estate."

Exhibit 6 is the deed of composition and discharge, dated the 15th of December, 1875, executed in pursuance of the resolution adopted at the meeting held on that day

It was made between the insolvents of the first part, and the several persons, firms, and corporations who are creditors of the insolvents. It was to the effect stated in the pleadings. It was expressed, however, that "the creditors do direct and authorize the assignee to deliver up and convey to the insolvents all their estate and effects, upon the deed being executed by a majority in number of the creditors of the said insolvents who had proved claims to the amount of \$100 and upwards, and who represent at least three-fourths in value of all the claims of \$100 and upwards which have been so proved." The deed was to "be ineffectual unless and until the same shall be executed by the aforesaid proportion in number and value of the said creditors of the insolvents."

The deed was not executed by the plaintiffs, as before stated. George Tudhope executed an assignment of the promissory notes he was to get under the composition and discharge to the assignee in insolvency, to secure the payment of the last three promissory notes of the insolvents given under the deed to the creditors who should prove their claims.

Exhibit 7 is the certificate of the assignee in insolvency, dated 27th of December, 1875, to the County Court Judge, stating (1), the resolution of the 15th of December to accept the $33\frac{1}{2}$ cents in the dollar, George Tudhope assigning his claim to secure the last three promissory notes: (2) That the signatures to the deed of composition and discharge comprise a majority in number of the creditors who have proved claims to \$100 and upwards, and who represent upwards of three-fourths in value of all the claims of \$100 and upwards which have been proved: (3) That the total number of claims which have been proved of \$100 and upward is sixteen and the total amount is \$26,983.75: (4) The number of creditors who have given their written consent to the proposed composition and discharge is eleven, and the amount of proved claims of \$100 and upwards, which they represent, is \$22,804: (5) That John Jacob Turver objects to the discharge [upon a ground not material here]: (6) That no dividend has been declared.

Exhibit 8, is the order of the County Court Judge under his hand and seal, dated the 2nd of February, 1876, absolutely confirming the deed of composition and discharge.

Exhibit 9, is the assignee's statement shewing that the claims proved amounted to \$26,984 75
And in that sum George Tudhope's claim was..... 13,034 10

Leaving for the other creditors who have proved their claims \$13,950 65
And of that sum creditors who consented to the deed had claims amounting to \$10,560 90

Exhibit 10, is an affidavit made by George Tudhope on 23rd of November, 1875, shewing he became security to the plaintiffs in two mortgages for the defendants for the sum of \$10,800, and to other persons to the extent of \$11,292. That was George Tudhope's first affidavit of claim. But it was allowed at \$13,034.10, because other parties, who were the direct creditors of the insolvents, proved their own claims, and so George Tudhope's claim, made in that affidavit, was reduced accordingly.

Exhibit 11 is an affidavit of George Tudhope, made on the 29th of January, 1876, in which he states his claim as surety for the creditors before named to be \$13,832.43. That sum included the plaintiffs' demand for \$10,800.

Exhibit 12 is a letter from the plaintiffs, dated 18th of December, 1875, to the assignee, asking what was done at the meeting of the 15th of that month.

Exhibit 13 is the assignee's answer to the plaintiffs' letter. The answer is dated 21st December, and informed the plaintiffs what had been done at the meeting.

Exhibit 14 is a letter from the plaintiffs, dated 29th of January, 1876, to the assignee: "Please inform us what has been done, are they going on with the business, and have they settled with creditors as proposed?"

Exhibit 15 is the answer of the assignee, dated 1st of February, 1876; to the plaintiffs' last letter: "The above insolvents are to attend before the Judge to-morrow for

confirmation of their deed of composition, &c. If approved, I expect they will resume business as soon as the necessary forms are complied with."

Exhibit 17 is the claim of the plaintiffs, sworn to on the 3rd of May, 1876, against the defendants, amounting to \$10,649.82, and valuing their securities at \$3,000, less insurance \$25, leaving \$7,665. 82.

Exhibit 16 is the assignee's answer, dated the 12th of May, 1876, to the claim of the plaintiffs: "By yesterday's post I received a claim from you against the above estate, which I regret to say has reached me too late, as under order from the Judge I surrendered the estate to Messrs. Tudhope some time since, and advised you on the 1st of February to somewhat that effect in reply to your enquiry. I therefore beg to return said claim to you, and must refer you to Messrs. Tudhope Brothers in reference to any settlement between you."

Exhibit 17 is a statement of the debts and assets of the insolvents at the time they made the voluntary assignment of the 27th of October, 1875. In it the plaintiffs' debt is stated at \$10,800, and George Tudhope for \$2,095.32. The debts are there stated to be \$32,430.27.

Exhibit 18 is a list of the creditors to whom the composition notes were given. George Tudhope there appears to have received notes amounting in all to \$3,446.03.

Exhibit 19 is an affidavit made by John Rutherford on the 29th of January, 1876, stating his claim against the defendants to be \$1,246 as surety for the insolvents, for which he holds their bond, to which George Tudhope is a party. John Rutherford is one of the creditors who signed the deed of composition and discharge.

Exhibit 20 is the answer of the plaintiffs of the 13th May, 1876, to the assignee's letter of the day before to them, expressing their surprise at the estate having been given up to the insolvents, and cautioning the assignee not to deliver the composition notes to George Tudhope.

The assignee in his evidence stated that the plaintiffs did not prove their claim. They did not attend the subse-

quent meetings, and he, the assignee, got no composition notes for the plaintiffs. George Tudhope proved in excess of the sum of \$10,338, but that is the sum his claim was allowed at, and his amount of notes was one-third of that sum. He got them, and gave them to the assignee as a hypothecque under the deed of composition and discharge. The first three of them were paid, and the money so paid was used in "meeting the insufficiency of the three last payments of the notes to the several creditors. The amount that he proved in virtue of the plaintiffs was hypothecated to the other creditors, and went to them by virtue of the deed of composition and discharge." The sum of \$504 of these three notes was not required to make up the deficiency of the last three notes of the other creditors, and that sum of \$504 was paid over to George Tudhope. Promissory notes for one-third of \$10,800 were made and handed to George Tudhope. There was \$1,496 paid on three of these notes. Of that George Tudhope got \$504, and the creditors the rest. There is about \$66 of that in hand to meet certain notes for which the creditors never filed their claims. He believed it was well understood by the creditors at the time that the debt which was so hypothecated was the \$10,800 that Tudhope was to pay the plaintiffs. His impression was that the plaintiffs were secured in other ways, and did not intend to rank on the estate.

It was admitted by counsel at the trial that if the claims which George Tudhope and John Rutherford subscribed for could not be computed, the deed was not executed by creditors whose claims amounted to three-fourths in value of the whole claims, to make it binding on the non-assenting or non-executing creditors: that the only direct liability of George Tudhope was \$170: that Rutherford's claim made was for \$1,246, and, if it be allowed, and the whole of George Tudhope's rejected, there was a sufficient amount represented to make the deed as to amount binding; Rutherford's claim was of the like nature as George Tudhope's: that no notes were ever made for or tendered to the plaintiffs, and that there was no individual liability by the defendants to

George Tudhope : that George Tudhope's liability to the plaintiffs formed part of the claim proved by and allowed for to George Tudhope, and that there was but the one debt of \$10,800. These admissions were made subject to the contention of the defendants' counsel that the particular matters so admitted affecting, as the plaintiffs say, the deed of composition and discharge, could not be investigated in this cause, but were proper matters for the Insolvent Court to deal with.

The learned Judge was of opinion that George Tudhope had not the right to make the claim on the estate which he did, nor had Rutherford for the claim which he made ; but as these claims were not contested, and an order was afterwards made and not appealed from confirming the deed of composition and discharge, he must hold the decision in *Rooney v. Lyons*, 2 App. 57, precluded him from any enquiry whether the deed was executed by the requisite majority of creditors in number and value to give it validity.

He held also there was no fraud in the proof of the claim by George Tudhope, because he made it fearing, if the plaintiffs did not do so, and they afterwards sued him, his claim upon the estate, or against the defendants, would be barred : that the plaintiffs knew that George Tudhope had proved a claim in respect of his liability to them, and they may have supposed they could take advantage of the proof and get the composition on their whole debt without waiving their security.

The inference which the learned Judge drew from the evidence was that George Tudhope proved in the way he did, because the plaintiffs were unwilling to prove. He then said : " If the evidence led me to the conclusion that the notes to be given for George Tudhope's composition were intended to represent merely a composition on the plaintiffs' debt, and yet were to be applied only in payment of or as security for the last three instalments of the whole composition to other creditors, to the exclusion of or with a view of defeating the plaintiffs' claim, I should hold the

deed to be fraudulent and void as against them. But finding, as I do, that there was no intention of defeating or delaying the plaintiffs' claim, and that the deed was not for and had not that effect, I enter a verdict for the defendants upon the issues raised on the first count."

"As to the second count and the issues upon it, the first and second issues were not relied on by the defendants. The fifth, sixth and seventh issues were governed by the decision in this case, in 27 C. P. 505, and must also be decided for the plaintiffs. And as to the third and fourth issues, the weight of authority appears to be in favour of the view, that the debtor must tender the notes or pay the composition, and that all the creditor has to do is to throw no obstacle in the way of his doing so effectually."

The learned judge, having power to allow such pleas out of the seven pleaded as he might direct, disallowed all but the second and third pleas to the second count, and these he found in favour of the plaintiffs; and he entered a verdict for them upon that count, and assessed the damages at \$2,553, being the composition upon the sum of \$7,665.82, the amount of the claim which they represented they had in Exhibit 17, after deducting the value of their securities.

In Easter term, May 21, 1879, *McMichael*, Q.C., obtained a rule calling on the defendants to shew cause why the verdict for the plaintiffs should not be increased to the full amount of their debt proved against the defendants, pursuant to leave reserved; and on the ground that the plaintiffs were not precluded from recovering the full amount of their claim in consequence of anything contained in the alleged deed of composition, or of the release contained therein, and that the issue on the replication alleging that the deed was void should have been found for the plaintiffs.

McCarthy, Q. C., obtained a cross rule, calling upon the plaintiffs to shew cause why the fourth, fifth, sixth, and seventh pleas disallowed by the learned Judge who tried the cause should not be allowed and a verdict be entered

for the defendants thereon, on the ground that no demand was made by the plaintiffs on the defendants for the composition notes mentioned in the second count, and that the plaintiffs never proved their claim, and, although secured creditors, never placed a value upon their security as required by the Insolvent Act.

In this term, September 1, 1879, *McCarthy*, Q.C., shewed cause to the plaintiffs' rule and supported the defendants' rule. The plaintiffs move to increase their damages to about \$11,000. The defendants to set aside the damages of \$2,553 which were assessed. The Insolvent Act provides that all claims shall be proved, and, if not disputed, that they shall stand. George Tudhope and Rutherford, who were sureties only for the defendants, proved as sureties. They knew some of the principal creditors would not prove, and they therefore proved for all their liabilities as sureties. When any of the principal creditors came in and proved, so much of the sureties' claim was struck out of their claim as the principal creditors proved for—a transfer in effect was made by reducing the sureties' claim, and placing it in the name of the principal creditors as they came in and proved. Some of the principal creditors have not proved, and as to these amounts the sureties' names represent them: Insolvent Act, 1875, sec. 104; *Clarke* on Insolvency, p. 278. The proof so made by the sureties is while the deed and order of confirmation stand conclusive: *Rooney v. Lyons*, 2 App. 53, in appeal from 40 U. C. R. 366; Insolvent Act, secs. 50 to 59. It is said the deed and order of confirmation are void for fraud, the fraud consisting in sureties proving as such for the claims they were sureties in order to secure the composition for the principal creditors whose claims they so proved. But that was not fraud in any form, and to avoid the deed, fraud in fact must be proved: *Lewis v. Tudhope*, 27 C. P. 505; *Robson* on Bankruptcy, 3rd ed., 232, 233, 707; *Ex parte Burrell*, *In re Robinson*, L. R. 1 Ch. D. 537; *Ex parte Linsley*, *In re Harper*, L. R. 9 Ch. 290; *Shaw v. Massie*, 21 C. P. 266. Rutherford had paid the

debt he was surety for before the proceedings were wound up. The plaintiffs were secured creditors, and as they did not prove and value their security, they cannot sue on the composition deed: *Ex parte Hodgkinson*, *In re Bestwick*, L. R. 1 Ch. D. 702; *In re Bestwick*, *Ex parte Bestwick*, L. R. 2 Ch. D. 485, in appeal before the Lords Justices, affirming it. They should have done so at any rate before bringing this action, as they might have done perhaps under *Lewis v. Tudhope*, 27 C. P. 505. But that case did not decide that as the claim of the plaintiffs was scheduled they could sue although they did not prove their claim. In that case George Tudhope's pleadings shewed only that he believed himself to be a creditor, but at present he is and must be taken to be a creditor by sec. 104 of the Insolvent Act, because he has proved as a creditor, and that proof has not been vacated. The proof here was more especially required, because the security had to be valued. The fourth, fifth, sixth, and seventh pleas were and are to be allowed to be pleaded, if they are good pleas in law. The learned Judge at the trial disallowed them only because he was of opinion the matters which they raised had already been determined to afford no defence. It is submitted that they do.

McMichael, Q. C., contra. The plaintiffs sent proof of their claim in May, 1876, and before this suit, to the assignee in insolvency, and he sent it back to them, because the order of confirmation had been granted, and he had in pursuance of the deed of composition and discharge given over the estate to the insolvents. The case is no longer in the Insolvent Court, and if the plaintiffs can still recover their claim, or the composition upon it, they need not prove it because they cannot now do it. The deed is no bar to the plaintiffs, because the sureties who proved had no right to prove, and omitting the claims they proved, there will not be creditors to the value of three-fourths of the claims who executed the deed, nor a sufficient number of creditors. But it is said that the deed, although invalid in fact, cannot be impeached for that cause so long as it and the

order confirming it stand. The case of *Lewis v. Tudhope*, 27 C. P. 505, decides the contrary. The case of *Rooney v. Lyons*, 2 App. 53, 55, 62, does not decide that the proof by sureties is conclusive while the deed is allowed to stand. On this point he also referred to *Shaw v. Massie*, 21 C. P. 266; *McLean v. McLellan*, 29 U. C. R. 548; *Dewhirst v. Jones*, 3 H. & C. 60. The execution of the deed by the sureties was a fraud on all the non-executing parties, and especially if it was done to the knowledge of the executing creditors to affect the plaintiffs, who did not execute the deed, without their knowledge and consent. The learned Judge at the trial deducted the value of the security and gave the plaintiffs the composition on the residue of their debt. The security has not produced anything like the sum stated as its value by the plaintiffs, and if the defendants will deduct only the sum which the properties produced, the plaintiffs will take the composition on the residue of their claim. Then as to the 5th, 6th, and 7th pleas desired to be added by the defendants. They are not entitled to plead them, because they would not be a good defence. It is the debtor's place to find out his creditor, and ascertain what his claim is: *Ex parte Peacock, In re Dufield*, L. R. 8 Ch. 682. The case of *Dewhirst v. Jones*, 3 H. & C. 60, shews that the plaintiffs, though they have not proved their debt, can sue on the deed, and that the value of the security may be deducted: *Ex parte Manchester and Liverpool District Banking Co., In re Littler*, L. R. 18 Eq. 249, 255; *Lewis v. Tudhope*, 27 C. P. 505; *Hobson v. Bass*, L. R. 6 Ch. 792. The plaintiffs are named as creditors in the schedules to the deed of assignment annexed, and for the proper amount. He referred also to *Ex parte Burrell, In re Robinson*, L. R. 1 Ch. D. 537, 547; *In re Shiers, Ex parte Shiers*, L. R. 7 Ch. D. 417, 419; *Re Halton*, L. R. 7 Ch. 723, 726.

September 20, 1879. WILSON, C.J.—The plaintiffs proved their original debt under the first count. The defendants proved their first plea to it, setting up the deed of com-

position and discharge as they had pleaded it. The plaintiffs had then to prove on the record, as it now stands, after the disposal of many of the issues, their fourth and fifth replications.

The fourth replication was not proved, because the material allegation was not proved, which was that if the plaintiffs' debt, which George Tudhope fraudulently represented by assuming to be the creditor in respect of that debt, when he was only the surety for the defendants, had not been computed as one of the debts of the defendants, there would not have been three-fourths in value of the debts represented by the creditors of the defendants who executed the deed. The fact being that if the computation of the plaintiffs' debt were excluded, there were more than the three-fourths in value of the debts represented by the creditors executing the deed.

The fifth replication was not proved, because it was not shewn that the defendants, with intent to defeat the plaintiffs of their claim, and to prevent them from ranking with the other creditors, procured George Tudhope, while a surety only to the plaintiffs for their debt, to prove for the same as a creditor for it in his own name. It was not shewn that the defendants procured George Tudhope to prove for the debt. It was shewn that George Tudhope did so of his own motion to secure the claim he proved for being represented, because he thought if the plaintiffs did not prove for and he afterwards paid it, the assets of the estate would be gone, and he would lose his recourse. And the way he dealt with other creditors to whom he was surety shewed that was the case; for although he proved for their claims as a creditor, yet when they came in and proved themselves, he deducted such amounts from the claims he had put in for them. Nor is it correct to say that the composition notes so given to George Tudhope diminished the proportion which each creditor was entitled to receive, for all the other creditors (leaving the plaintiffs aside for the present) received just the amount they were to receive and were entitled to, and in no event could they

[GODWIN]

have got more. And as to the plaintiffs' debt, the giving of the notes to George Tudhope for that debt, and without the plaintiffs' consent, did not diminish the *proportion* which they were entitled to receive, nor did it affect the plaintiffs' claim further than this, and in that respect it affected all the other creditors equally with the plaintiffs, that by giving these extra and unauthorized notes to George Tudhope, the debtors diminished their funds *pro tanto* and disabled themselves to that extent from paying or so conveniently paying the plaintiffs and the other creditors.

If the plaintiffs adopted the act of George Tudhope in so assuming to represent their debt in his own name as the creditor, there was no fraud or wrong done by any one to any one. But as it was done without the consent of the plaintiffs, the claim so made by George Tudhope in his own name, and the execution of the deed by him, were wrongful and unauthorized as regards the plaintiffs, but not as regards the other creditors, because they seem to have known all the facts, and to have suffered George Tudhope so to act, thinking very likely that he had the right by law to act as he did. But even then such act of George Tudhope did not reduce the proportions the creditors were to receive, for whether George Tudhope's claims were in or not the creditors were not to receive more than one-third of their debt. The composition would have been computed on the same and the like amount in either case. It is not that by the insertion of the claim in George Tudhope's name the debt was nominally or actually increased, for his name, for that purpose, was taken to mean the plaintiffs' name, and if the plaintiffs' name had been used George Tudhope's name would not have been there for this debt.

What the effect of all parties so acting with a knowledge of all the facts to the plaintiffs' prejudice may be in case the plaintiffs fail by reason of such conduct to recover from the defendants I will state in a little. At present it is sufficient to say that the allegation as to the *proportion* being diminished was not proved.

The next part of the replication to be considered is that part of it which alleged that the defendants, in pursuance of the fraud and to defeat the plaintiffs' claim, induced George Tudhope to consent that the notes he got for the plaintiffs' debt "should be postponed to all the other creditors," and they "were postponed," and "in consequence the plaintiffs were not enabled to rank *pari passu* with the other creditors, and that as to the plaintiffs the said deed is fraudulent and void."

That was not the case proved. The agreement was that the dividends on the notes which George Tudhope was to receive in respect of the plaintiffs' debt were to remain as a security to the other creditors for the due payment of the three last of the promissory notes. That is not the same as the notes being postponed to all the other creditors. These notes were to be paid at the like time as the other notes were. It was the proceeds of them which were to lie over as a security. Postponing the notes means postponing the time of payment of the notes, and that was not done.

If there is any difficulty in the way of the plaintiffs recovering their full composition upon the deed, I should be in favour of the plaintiffs amending their replications or replying in any form so as to impeach the deed of composition and discharge which has been used so much to their prejudice.

What are the facts? The plaintiffs had a claim against the defendants to the amount of \$10,800, or about that sum. The defendants in the schedule to their assignment in insolvency of the 27th of October, 1875, inserted the plaintiffs' names as their creditors to the amount of \$10,800, and they made oath to that fact. In the printed circular of that date sent by the assignee to the respective creditors, that claim is contained in the plaintiffs' name and to that amount. In the affidavit of George Tudhope of the 23rd of November, 1875, and filed on that day, which was the first meeting of creditors, he declared the defendants were "liable to make good to me any loss I may sus-

tain by reason of the following liabilities undertaken by me on their behalf, previous to their insolvency—namely : On two several mortgages made by me to Messrs. Rice Lewis & Co., securing them against the liabilities to them of the insolvents to the amount of ten thousand eight hundred dollars." And then it sets out sixteen other cases of suretyship by him for the insolvents, amounting, exclusively of the plaintiffs' claim, to upwards of \$11,000. George Tudhope is the father of the defendants. He was chairman at that meeting, and he was then appointed one of the inspectors of the insolvent estate. The plaintiffs were present at that meeting, but at no other meeting. They put in no claim at it. The plaintiffs' debt so sworn to by the insolvents and by their surety, George Tudhope, it is not pretended has ever been paid to the plaintiffs. It is said, however, to have been extinguished by the deed of composition and discharge ; and the plaintiffs say they are willing to submit to that, and to accept of the composition, if the defendants will pay it to them. It is strange then that such a claim should be resisted, but it is resisted.

The defendants say :

1. They never executed the deed of composition and discharge. The deed was proved, and it is well for the defendants it was proved.
3. That the plaintiffs were not their creditors. That was proved by the defendants' own oath.
3. That the plaintiffs did not demand the composition notes, and the defendants did not refuse to give them. It was the defendants' duty by the deed to give the notes. They knew of the plaintiffs' debt and its amount, and their residence and place of business.
4. That the time had not expired in which the defendants' notes, if given to the plaintiffs, would have been due. Two of the notes were overdue at the commencement of this suit, and the fact that the notes to be given were not due is no reason why they should not have been given to the plaintiffs at once and before they were due.
- 5 and 7. That the plaintiffs did not file or prove their

claim. That is no defence in a case of composition : *Lewis v. Tudhope*, 27 C. P. 505 ; *Ex parte Peacock, In re Duffield*, L. R. 8 Ch. 682 ; *In re Bestwick, Ex parte Bestwick*, L. R. 2 Ch. D. 485.

6. That the plaintiffs held security and did not specify the nature and amount of it, nor value it. That plea is true if the defendants are allowed to plead it, unless the affidavit of the plaintiffs, made on the 3rd of May, 1876, in which they did specify the security they held and the value of it, and which affidavit they transmitted to the assignee in insolvency, and he returned it to them because the estate had been given up to the insolvents, be held a sufficient statement and valuation of the security.

I am not prepared to say that the affidavit, sent after the estate was reconveyed to the defendants and the discharge and composition were confirmed, although the assignee would not receive it, is not a sufficient specification and valuation of the security which was held by the plaintiffs. So long as the plaintiffs have a right to come in for their share of their composition, they had the right to take any steps which were required to enable them to claim it. They were not bound to prove their claim, as before stated. They were not bound to value their security. They could retain it, and still preserve their claim against the estate until they had realized their security, and then by deducting the amount so got for it, claim for the balance. If they did not sell, they could claim for the balance by valuing the security, and deducting that value for their debt. The latter course is the one which they took. The cases I have before referred to shew this may be done.

If there is anything informal or irregular in the plaintiffs' proceedings in that respect, by reason of the assignee not receiving and filing the affidavit, or from any other cause, about which it is not worth while to enquire, so long as it was and is substantially correct, the defendants, who are not at liberty to plead this defence without leave, should not be allowed to set it up, for the plainest of

reasons. And these reasons are: The defendants knew of this security, and they made no mention of it in their assignment or affidavit. George Tudhope, there is every reason to believe, knew of it, and he made no mention of it in his two affidavits. The defendants have assented to the plaintiffs' whole demand being compounded for without deducting this security, and they have actually given the composition notes on the full debt without any such deduction to George Tudhope. To suffer the defendants to dispute the claim on such a ground would be to grant them a degree of indulgence they are by no means entitled to.

In my opinion, and I speak of course only for myself, on a replication properly framed the deed of composition and discharge could be avoided as a fraud upon the plaintiffs, if George Tudhope's name really means the plaintiffs' name, because it was a manifest fraud in him to give, and in the creditors to stipulate for as the very basis of their assent to the composition, and to receive from George Tudhope the notes intended for the plaintiffs as a security to them for the payment of any of their own notes. The plaintiffs cannot be bound by such an arrangement, which the parties to it knew to be prejudicial to and a fraud upon the plaintiffs; and perhaps the plaintiffs could not *confirm* George Tudhope's prior unauthorized acts without adopting this one also.

The deed also may be equally void, although George Tudhope's name does not strictly represent the plaintiffs' name, if the insertion of George Tudhope's name in the deed was calculated to embarrass or prejudice the plaintiffs in the recovery of their composition; and the delay and litigation for more than the past three years by the defendants' refusal to pay the plaintiffs is very cogent evidence against the defendants in this respect.

I incline to think that the fact of all parties to the deed agreeing to and suffering a surety, in direct violation of the Act, to rank as a creditor in his own name, when they knew he had not paid the debts he proved or subscribed

for, and that they all consented to these surety claims being given up to those creditors not assumed to be represented by George Tudhope, as a special security for the payment of the three last of their notes ; and the fact that such creditors demanded that as the condition only upon which they would assent to a composition; and the further fact that the assignee, who knew the whole matters, certified untruly to the County Court Judge that the requisite number of creditors, and representing three-fourths in value of the debts, had executed the deed, do nullify and avoid the deed absolutely, because of the fraud which affects every part of these transactions.

I am of opinion also, if the plaintiffs cannot recover their composition from the defendants by means of these transactions rendering the defendants unable or less able to pay their demand, that they ought to have, and I trust, if necessary, it may be found they have, the right to call upon the other creditors, and upon all others who have been parties to the wrong done to the plaintiffs, to contribute and make up to them their share of the composition.

I may be allowed to say that I think I should not have come to the same conclusion which this Court did in this case in 27 C. P. 505, that the discharge was independent of the fact of the giving and payment of the composition notes, and the defendants may not be too sure of their position in that respect even now.

Upon the whole, I am not desirous of opening up the insolvency proceedings, if it can possibly be avoided. And it may be well for the defendants to consider whether the decision of the learned Judge who tried this cause, and who has determined the case rightly upon the pleadings as they now are upon the record, and who has dealt liberally with them by deducting the security at \$3,000, which was the plaintiffs' valuation, in place of deducting only the sum it produced, should not be acquiesced in and paid at once, rather than run the risk of having the whole of the insolvency proceedings vacated.

As the record stands, the learned Judge's decision is right in all respects, and cannot be disturbed.

Both rules will therefore be discharged.

OSLER, J.—I agree in the result. But I do not think that any fraud was committed or intended by the way in which the proceedings were carried out. The plaintiffs, as it appears to me, advisedly abstained from proving their claim while the composition deed was being prepared, and up to the time it was confirmed. They knew, or ought to have known, that George Tudhope had proved for the debts in respect of which he was surety, for they were represented at a meeting at which that was done, and they neither contested the confirmation of the deed before the County Judge, nor appealed from his order. They never supposed that they were entitled to the composition payments payable in respect of George Tudhope's proof, for they attempted to prove for or value their debt after the deed was confirmed. The evidence does not, in my opinion, lead to the conclusion that it ever was intended by the insolvents that the plaintiffs should be prevented from ranking for or proving their debt so as to become entitled to receive notes for their composition, and it is clear that it was not intended that George Tudhope should ever receive any part of the composition which was to be paid in respect of his proof, except in the event of the secured creditors not proving at all, and of his being compelled to pay them. On the contrary the plan adopted, of retaining the composition to be paid on George Tudhope's claim as security for the last three instalments to all creditors except George Tudhope, would enure to the plaintiffs' benefit as much as to that of other creditors, if they proved their debt, or rather if they filed their claim with a valuation of their security. Unless the effect of the deed was to prevent the plaintiffs from obtaining the same composition as other creditors, I cannot see how it can be said to be fraudulent in this respect as against them. It has not been shewn that this was the effect of the deed. They did send in their

claim to the assignee with a valuation of their security, who returned it to them, improperly, as I think, but why did not the plaintiffs apply then to the defendants, or insist upon the assignee procuring their composition notes? Either of these courses was open to them, and had either of them been taken this action would probably never have been heard of.

The only arguable ground, in my judgment, for contending that the deed was fraudulent, is that by permitting George Tudhope to rank when he was not in fact a creditor, the rate in the dollar which the debtor was able to pay his real creditors was diminished by the amount of the composition on Tudhope's claim. The answer to this contention, I think, is, that it is not shewn that the composition was not in fact such as was for the benefit of the creditors generally, and that it does appear that George Tudhope was not to receive his composition, if the creditors, whose debts he secured, came in and proved; so that in fact the composition agreed upon represented fairly what the debtor was able to pay.

I think the verdict should stand, because, in my opinion, the plaintiffs are entitled to say that they did put a value on their security. If they are not in this position, then they were not in a position to sue at all, for before they could be entitled to their notes they must have shewn the amount on which such notes should be given. This could only be done by deducting the value of the security they held, as the authorities referred to by the Chief Justice shew.

GALT, J., concurred.

Rules discharged.

**BEAVER AND TORONTO MUTUAL FIRE INSURANCE
COMPANY V. SPIRES.**

*Mutual insurance—Unauthorized branches—Re-insurance—Guarantee stock
—Debentures.*

In actions by plaintiffs, a mutual insurance company incorporated by special Act, 32 & 33 Vic. ch. 70, D., against defendants on their policies for the losses and liabilities on the winding up of the company under 40 Vic. ch. 72, D.

Held, that defendants were not liable, as their insurances were effected in branches not authorized by the Acts affecting the company, and were therefore invalid.

Held, also, that even if the insurances were valid, the liability would only be for the losses and liabilities in the particular branch in which the insurances were effected, and not for the general losses and liabilities of the company, and that sec. 4 of the Winding-up Act in no way extended their liability: that, in such event, a claim for re-insurance was sustainable, although the company had not paid the amount, but only to the extent of the re-insurance of each particular policy, and that no such claim could arise where the policies were cancelled for non-payment of the assessments, neither could there be any such claim against an insured where he had become insolvent, and the policy was assigned to the assignee with the consent of the company: that a claim for guarantee stock was sustainable, notwithstanding the by-law creating it was objectionable in pledging the whole instead of two-thirds of the premium notes as security for the payment thereof, and in other respects as stated below: that a liability for debentures issued by the company could also be supported, but only the members liable for the losses and liabilities for payment of which the debentures were issued would be liable for the debentures themselves; and that the fact of the issue of debentures being in excess of the amount authorized by the statutes, namely, one-fourth part of the premium notes, did not render the whole issue invalid, but only the amount so issued in excess.

DECLARATION:

First count: That the defendant, in consideration the plaintiffs would insure his hotel, &c., against loss by fire to the amount of \$3,900, and would grant their policy therefor, did, on the 23rd June, 1875, agree with the plaintiffs to pay them whatever assessments the directors of the plaintiffs might from time to time declare to be required upon the policy, not exceeding in the whole the sum of \$256.80; and did, on the 8th of July, 1875, agree with the plaintiffs to pay them whatever assessment the said directors might from time to time declare to be required upon the said policy, not exceeding in the whole the sum of \$79.20, in

addition to the said \$256.80. And thereupon the plaintiffs made and issued their policy of insurance under their seal to the defendant, whereby they insured the property of the plaintiff against loss by fire, to the amount aforesaid, for three years; that the said directors thereafter from time to time made assessments upon the defendant for sums in the whole amounting to \$182; and that such assessments were for amounts determined by the said directors to be necessary to meet the losses and other expenses of the company during the currency of the said policy; and that the defendant was, by virtue of his said undertakings, liable to such assessments, of all which he had due notice; and all conditions were fulfilled, &c., to entitle the plaintiffs to recover from the defendant the said sum of \$182, yet he has not paid the same.

The common counts were added,

Pleas. To the first count.

1. That the defendant did not agree as alleged.
2. That the plaintiffs are not a body corporate.
3. That the plaintiffs did not make and issue their policy as alleged.
4. That the directors did not make the assessments as alleged.
5. That the assessments were not for amounts by the directors declared to be necessary to meet the losses and expenses of the company, as is therein alleged.
6. That the plaintiffs were incorporated under the Act 32 Vic. ch. 70, D., and by that Act the plaintiffs were authorized to divide their business into three branches, to be called, the Farmers' branch, the Household branch, and the Mercantile branch, and they were not authorized by the said Act to form or carry on business under any other branch: that the said policy purports to be issued in a branch called the General branch; and that the plaintiffs, in attempting to divide their business into four branches, and to insure in the said General branch, exceeded their corporate powers, and had no power to issue the said policy.

7. That the assessments were not made by any persons or body, or assembly, or meeting of persons duly competent or having power or authority to make the same, or duly assembled and constituted for the purpose of making the same.

8. That the assessments were made for purposes other than those for which the plaintiffs were authorized by their Act of incorporation and by-laws.

9. To so much of the first count as relates to losses, the defendant says, that the plaintiffs were incorporated under the Act aforesaid, and had power to divide their business into the three branches aforesaid; and by the said Act it is provided, that members of the said company insuring in one branch shall not be liable for any claims in any other branch; and that the alleged losses for which the said assessments were made happened and were made in the Farmers, Household, and Mercantile branches, or some or one of them, and not in the General branch.

The following plea was added: that the assessments made were not necessary to meet the losses and other expenses of the company during the currency of the said policy.

To the common counts:

10. Never indebted.

11. Payment.

Issue.

The cause was tried before Patterson, J., without a jury, at Toronto, at the Winter Assizes of 1879.

The evidence, so far as material, is set out in the judgment.

The plaintiffs relied upon the statutes referred to in the judgment, by which they contended they had the power to compel the members who had given premium notes to pay the full amount of their notes to meet the debts and liabilities of the company in winding it up.

The defendant said he was not liable to pay at most more than his proportion of the losses sustained by the particular branch in which he was insured: that he was

not liable to pay any part of the reinsurance, because the company had not re-insured him, but had cancelled the policy : that he was not liable for any part of the debenture debt, because it was an over issue of more than one fourth part of the premium notes, and because the debentures had been issued to pay old debts, before he became a member, and in part for a private debt of or assumed by the company, and wrongfully contracted by the plaintiffs : and that he was not liable for the guarantee stock of the company.

BEAVER AND TORONTO MUTUAL FIRE INSURANCE
COMPANY v. CHAMPNESS.

BEAVER AND TORONTO MUTUAL FIRE INSURANCE
COMPANY v. BRADFORD.

These were similar actions against the defendants, who were insured in the Water Works branch, for assessments made respectively against them.

The same objections were taken.

It was also contended that the defendant Champness was discharged by reason of his becoming insolvent, and his assignee assuming the policy, and the plaintiffs dealing with him.

The Water Works branch stood in a different position from the General branch, as will appear in the course of the judgment.

The learned Judge, after reserving the cases for some time, gave a very full and clear opinion upon the evidence, after hearing the cases carefully argued by counsel upon each side. His opinion was, that the verdict should be entered for the defendant in each case.

In Easter term, May 20, 1879, *McCarthy*, Q.C., obtained a rule *nisi* in each case, calling upon the defendant to shew cause why the verdict should not be set aside, and a verdict

be entered for the plaintiffs, with damages for the amount of the assessment made by the plaintiffs upon the defendant, on the ground that the assessment so made was and is legal.

In Easter term, June 6, 1879, *J. E. Rose* shewed cause for Spires. The sixth plea shews the company were incorporated by the 32 & 33 Vic. ch. 70, D., and by sec. 8 they were authorized to divide their business into three branches, to be called the Farmers' branch, the Household branch, and the Mercantile branch. The policy was issued in a branch called the General branch, and the company exceeded their powers in dividing their business into four branches. The company thought they were within the operation and provisions of the 36 Vic. ch. 44, O., which enabled Mutual companies to divide their business into as many branches as they pleased, but the case of *Orr v. Beaver and Toronto Mutual Ins. Co.*, 26 C. P. 141, decided that the plaintiffs had no right or authority under it. Such a division of their business was therefore illegal. The 40 Vic. ch. 72, D., enabled the company to wind up. Sec. 4 gave them power to collect all premium notes taken by them prior to the 1st of February, 1877, and to apply the proceeds to the payment of their liabilities, including all losses by fire incurred upon valid and subsisting policies prior to the passing of the Act, which was on the 28th of April, 1877, and that everything necessary to a complete winding up of their affairs might be done and effected. Under that Act, secs. 4, 5, the company have proceeded to make one common fund of all the premium notes and assets of the company, and out of that fund to pay their general liabilities, irrespective of the rights of the policy holders who were insured in a particular branch to contribute to the liabilities only of that branch. The by-law under which the assessment was made on all the members of the company for the general liabilities of the company, in place of upon the respective members of the several branches for the liabilities of each branch, was *ultra vires*: C. S. U. C. ch. 52, secs. 13, 14. See 31 Vic. ch. 32, sec. 5, O.; 27 & 28

Vic. ch. 99, sec. 3. It is also objected that the debentures, which were issued, and which amount to a very large sum, and for which the defendant is sought to be made liable, were and are void, because they were issued for an amount beyond that which the statutes authorized: Consol. Stat. U. C. ch. 52, sec. 58; 31 Vic. ch. 52, sec. 12, O. These Acts authorized debentures to be issued for an amount not exceeding one-fourth of the amount then unpaid on the premium notes. The unpaid part of premium notes at the times of such issue was about \$153,000, and the debentures issued amounted to about \$73,000, not far from twice as much as the authorized amount. The guarantee stock which was issued was also an illegal issue, because the by-law No. 28, under which it was issued, pledged all the premium notes of the company in place of only two-thirds of their amount: 27 & 28 Vic. ch. 38, sec. 6. The plaintiffs have not shewn they are suing for losses and expenses which accrued during the currency of the policy: Consol. Stat. U. C. ch. 52, secs. 11, 12, 13, 14; *Green v. Beaver and Toronto Mutual Ins. Co.*, 34 U. C. R. 78; *Orr v. Beaver and Toronto Mutual Ins. Co.*, 26 C. P. 141. Mr. Thompson, the manager of the company, said he could not tell how the assessment was made up: that it was impossible to shew what losses had occurred in each branch. The other branches were closed, and the business of the company was all brought into the General branch, in which the plaintiff was insured; and the case of *Beaver and Toronto Mutual Ins. Co. v. Trimble*, 23 C. P. 252, shews that cannot be done. The defendant cannot be liable for any loss or liability of the company after March, 1878, because the company then cancelled his policy, yet they are claiming from him a share of the liabilities of the company up to the time of the final winding-up of the company: 24 Vic. ch. 47 repealing sec. 77 of the Act of 1852. The defendant is not liable for any claim for reinsurance; firstly, because the company have not reinsured; and, secondly, because they cannot do so, as they elected to cancel the policy: 40 Vic. ch. 72, sec. 5, D.

See the company's report, 21st February, 1876, p. 4. The debentures were issued, not for current losses, but to pay old debts, and for debts incurred before the defendant became insured; and they are void altogether, because they were issued for a sum exceeding by far one-fourth part of the unpaid premium notes. The reserve fund of \$13,000, mentioned in the report of the 21st February, 1876, is not accounted for.

He also shewed cause for Champness. In addition to the matters above stated, he contended that the defendant was discharged by his insolvency, and as the defendant's assignee assumed the policy, and the company dealt with the assignee, the assignee and not the defendant was the one, if there was liability at all, to sue. Champness had two policies, dated the 16th of July, for three years, in the Water Works branch. The one policy was for \$3,000, and the premium note was \$360, and the company assessed the defendant \$288. The other policy was for \$1,700, and the premium note \$204, and the plaintiffs assessed the defendant for the full sum of \$204.

Beaty, Q. C., shewed cause for Bradford. This defendant, on the 3rd of June, 1876, insured his own property for \$1,000, and the property of J. C. Hodgins for \$5000, both for three years, and the defendant gave his premium note for \$800, and the company had assessed him for \$721. The same objections are relied upon for this defendant as for the others. He was insured in the Water Works' Branch. There was no reinsurance made. The business of the company was not carried on after the end of December, 1876. He was insured therefore for only a few months. The evidence shews the losses in the Water Works Branch were from the time Bradford insured until September, 1877, \$833 39. The amount of premium notes of that branch on the 3rd of June, 1876, were \$51,179.32, and the claims paid on account of that branch in the whole year 1\$76, were \$5,144.37. The assessment claimed from him was not required to pay any losses in his branch, and he is not liable on the present assessment, unless he is made so by

the 40 Vic. ch. 72, D., but the true effect of that statute is not to enlarge the liability of those insured with the company, or to alter it in any way. The defendant has long since reinsured himself, and he does not require the company's re-insurance, which as a fact has never been made. Bradford is not charged only with what would be his own re-insurance, but with a proportion, according to the amount of his premium note, of the general re-insurance of all the policy holders. If the guarantee stockholders are to be indemnified by the policy holders generally, that will be making the insured in one branch contribute to the obligations of the members of the other branches. The guarantee stockholders have no further claim than that which the statute gives them.

McCarthy, Q. C., and Huson Murray, contra. This company was formed by the amalgamation of two companies, The Beaver Mutual and The Toronto Mutual, under the 32 & 33 Vic. ch. 70, D. Each of these companies before their union was established under the Con. Stat. U. C. ch. 52. The 27 & 28 Vic. ch. 38, amended that Act. The 27 & 28 Vic. ch. 99, extended the powers of The Beaver Mutual. The 31 Vic. ch. 52, O., extended the powers of The Toronto Mutual; and the next year the two companies were united as stated. The Con. Stat. U. C. ch. 52, secs. 11, 12, 13, gave power to Mutual companies to divide their business into two branches. The 32 & 33 Vic. ch. 70, D., gave power to this company to divide their business into the three branches before mentioned. The 36 Vic. ch. 101, D., gave the company power to establish a live stock branch. The 36 Vic. ch. 44, secs. 60, 61, O., are the sections under which this company assumed to increase the number of their branches of business. If the company have not the power under the last mentioned Act to increase the number of their branches, the act of so enlarging, or extending, or managing their business has been validated by the 40 Vic. ch. 72, D., sec. 4 of which declares that if the company wound up their business all premium notes taken by the company prior to the 1st of

February, 1877, should be valid, and the same might be collected by the company, and the proceeds applied to the payment of their liabilities; and that statute was passed after the decision of this Court in the case of *Orr v. Beaver and Toronto Mutual Ins. Co.*, 26 C. P. 141. The company further say, that the defendants cannot object to the division of their business into branches not specially mentioned in any of the Acts which apply to them, because before any of them insured the company had discontinued all other branches, excepting The Mercantile, The Water Works, and The General; and the Mercantile Branch just mentioned was afterwards called The General Branch. See report of the company of 26th of February, 1875, p. 4, of their affairs for the year 1874. It is said the assessment was not made for losses happening during the time of the policy. The account made up shews liabilities to the amount of \$183,443, while these policies were in force, and the total assets of the company fall short of that amount, so that the full payment of each premium note must be called in to meet the demands of the company, and the 40 Vic. ch. 72, D., authorizes that to be done, and to be applied generally in discharge of the debts of the company. The debentures were issued, as it was said, to pay all debts, and for losses before the time the defendant was insured. The learned Judge so found, but it is not so. The report of the company of February, 1875, shewed assets over liabilities—

At the end of 1874 to be.....	\$84,000
At the end of 1875 to be.....	104,000
And the losses in 1876 were.....	76,252

It was contended by the defendant that the plaintiffs had not shewn a state of things which justified them in calling in the whole of the premium notes of the company even if they had possessed the power of doing so. But the following statement, as well as those produced at the trial, will shew the liabilities of the company exceeded at the winding up the amount of their assets.

1875—There was paid for losses the sum of...\$73,771	
1876—The losses were paid by the debentures issued to the Federal Bank, amount-	
ing to..... 18,000	_____
Making..... \$91,771	
Then as to the debentures for \$55,000.	
In 1871 there was borrowed from the bank .. \$23,936	
Part of it was paid in 1872..... 2,480	_____
Leaving, say, unpaid..... \$21,500	
That sum remained unpaid until the deben-	
tures for \$55,000 were given in 1876.	
In 1874 there was borrowed from the bank... 13,839	_____
These two sums make..... \$35,339	
Now if that sum be deducted, because it was as the defendant says for old debts, from the debentures of..... 55,000	_____
There will be..... \$19,661	
of these debentures for new debts, and for which the defendant is liable, and that sum of..... 19,661	_____
Added to the \$91,771 above mentioned, will make \$111,432	
Then adding to that sum the losses since the 1st of January, 1877, and for which by the statute the defendant is liable... 27,470	_____
There will be a total liability for which the de- fendant is bound to contribute of...\$138,902	
It has now to be shewn it was necessary for the com- pany to make as large a call as they have sued for; or, in other words, the debts of the company equal their assets, or very nearly so.	
The assets stand as follows:	

Unpaid premium notes, say.....	\$137,000
Deduction for bad debts by a forced collection, say	34,000
Available...	\$103,000
Assessed notes, and unpaid assessments	\$26,194
Like 25 per cent. deduction.....	6,548
	— 19,646
Other assets	18,754
Total.....	\$141,400

As to re-insurance, the company is entitled to recover it, because by 40 Vic., ch. 72, D., sec. 5, they are obliged to make re-insurance. It is said the company cannot sue for it, because they have not re-insured, and have not paid the re-insurance, but it cannot be expected they should re-insure before they have funds for the purpose, and therefore they are entitled to sue before making the re-insurance. The company gave liberty to the defendant to re-insure in any office he pleased, and they engaged to pay the amount to do so from the premium note. See their memorandum of the 14th of September, 1877. As to the guarantee stock, it was authorized by Con. Stat. U. C. ch. 52, secs. 31, 55, sub-sec. 2. That stock was available for all the branches: sec. 31. Section 6 of 27 & 28 Vic. ch. 38, shews that two-thirds of the value of the premium notes may be pledged to the guarantee stockholders. The by-law, No. 28, passed on the 21st of May, 1874, provided for the guarantee stock, which was then limited to \$90,000, being extended to \$500,000. The stock subscribed was \$72,000, and there was paid up of it \$32,110.48. There were premium notes of the company hypothecated to the shareholders in security for their stock. The notes in gross were \$72,652.51, and net \$37,334.07. The by-law of 21st May, 1874, made the premium notes of the company a security for the stock. The profits of the company were to form a reserve fund as additional security for the stock. It was not, however, the notes which the company held in 1874, when that by-law was passed, which was to be a security

for the stock, but all notes which the company then or thereafter might hold. The general guarantee stock of \$32,110.48 was added to by the terminable guarantee stock being transferred to it amounting to \$2,770, making the total of \$34,880.48. It is said the debentures were and are illegal, because the company made an over issue. If that be so, the company are still liable, for they must pay these debentures to the holders of them. The Acts relating to them are Consol. Stat. U. C. ch. 52, sec. 57, and following sections; 31 Vic. ch. 52, sec. 12, O.; 32 & 33 Vic. ch. 70, D. The general Act restricted the issue of debentures to one-fourth the amount of the company's notes, but the special Acts gave much larger powers; so there was no excessive issue. Mr. Justice Patterson held that the company had no more power by the special Acts than they had by the general Act. The general Act allowed issue to one-fourth of notes, and the 31 Vic. ch. 52, sec. 12, O., allowed one-fourth more, so that the company had power to issue debentures to one-half the amount of premium notes: *Gordon v. Sea Fire Life Assurance Society*, 1 H. & N. 599; *Brice on Ultra Vires*, 2nd ed., 272, 274, 279. If Champness and Bradford are not liable otherwise, they being insured in the Water Works Branch, they are liable, at any rate, under the Winding-up Act of 1877. As to Bradford, the company admitted the assignee as entitled to the benefit of the policy, and the claim is against the assignee. It has been said that the claims now put forward by the company are chiefly for old liabilities, but that is not so, as the company was in good condition until the end of 1874. The embarrassment of the company was occasioned by the losses of 1875 and 1876, as the following statement will show:

By the company's report their losses in 1875	
were	\$78,000
Returned premiums	5,000
Re-insurance	2,491
Commissions	16,224
Expenses	21,000
Total for the year.....	\$122,715

Total for the year	\$122,715
The premiums, &c., were.....	105,000

Making the loss for that year.....	\$17,715

For 1876 no such special statement was made up. But the losses by fire were about \$76,000.

September 20, 1879. WILSON, C. J.—It is not quite easy by giving the evidence as it was taken at the trial, to make a very plain statement of the different points involved in the case.

The following memorandum of liabilities of the plaintiffs made up to the first of January, 1877, in detail, will shew the matters which require to be considered.

1. Liabilities for losses in Water Works Branch	\$ 3,490
In General Branch.	22,861

	\$26,351
2. Amount required for reinsurance of existing policies in Water Works Branch..	\$1,149
In General Branch	35,515

	36,664
3. Sundry items—Bills payable	\$5,610
Deposits	1,698
Interest, salaries, &c.	3,450

	10,758
4. Debentures held by Ontario Bank..	\$55,000
" " by Federal Bank... 18,000	
" " by Montreal Bank.. 5,800	
" " by " " " 5,000	

	83,800
5. Guarantee Stock—Permanent.	\$23,100
Temporary	2,770

	25,870

Total amount upon 1st January, 1877.	\$183,443

At the date of the defendant's insurance, 23rd June, 1875, the business of the company was said to be divided

into two branches, called the General branch, and the Water Works branch, and this insurance was in the General branch.

The management of the plaintiffs' business in different branches was provided for as follows: The Consol. Stat. U. C. ch. 52, sec. 11, enabled the company to separate its business into two branches.

1. For isolated risks and property not hazardous.
2. For property hazardous and not hazardous.

The 32 & 33 Vic. ch. 70, sec. 8, D., authorized the united company then created to divide their business into three branches:

1. The Farmers branch, comprising the then existing risks of the Beaver Mutual.
2. The Household branch, and
3. The Mercantile branch. These two last branches comprising the then existing risks of the Toronto Mutual.

By section 2 the united company were to have all the rights, &c., conferred on Mutual Insurance Companies by the Consol. Stat. U. C. ch. 52, and the several amendments thereof, not inconsistent with the special Act of 27 & 28 Vic. ch. 99, and with the Act 32 & 33 Vic. ch. 70, D.

The plaintiffs had no further power of dividing their business into branches, unless the 36 Vic. ch. 44, O., applied to the plaintiffs, and it has been decided that it does not.

The plaintiffs believing, however, that it did, divided their business, under section 60 of that Act, by making three additional branches:

1. The Manufacturers branch ; 2. The City branch ; and
3. The Live Stock branch. [As to which last branch, see 36 Vic. ch. 101, sec. 1, D.]

In March, 1871, the Household branch was merged in the Farmers' branch, and the board in February, 1875, resolved to issue all farm policies thereafter in the Mercantile branch or General branch.

The business was then said to be divided into, 1. The City or Water Works branch ; and, 2. The Mercantile or General branch.

In the report of the company on the 6th of March, 1870, the assets over liabilities were stated to be \$101,220.65. That was before the happening of the Ottawa fires.

In the report of the company on the 23rd of March, 1871, it is stated as follows : " We meet together on this occasion under circumstances which have no parallel in the history of fire insurance. On the 16th of August last year the affairs of the company were in a condition so flourishing that your board could not but look forward with pleasure to the prospect of presenting you this day with an unusually favourable report. They expected to be able to say that the business was largely increased ; that the company was free of debt, and that a handsome fund remained on hand towards the reduction of future assessments. But on the 17th an event occurred so disastrous and involving so many of our members in its frightful consequences, that all ordinary business calculations were put to flight, and the only question left for your board to consider, was what was their duty to the sufferers, and how they might best fulfil it." The report then refers to the great Ottawa fires which happened at that time. It is said that upwards of four hundred families had been burned out, of which number eighty-two were insurers in this company ; and that no other insurance company had suffered one-fifth the amount of loss which had fallen on this company. The losses of the company amounted to \$63,747.96 ; and by reinsurance they had reduced the net loss to \$60,265.79. Up to the date of the report, the company upon their assessments on two-fifths of the premium notes in the Mercantile and Household branches, and on one-third of the premium notes in the Farmers branch, collected \$47,012.75, leaving \$23,113.25 uncollected. The loss in the Mercantile branch, was \$34,284.63, and in the Farmers branch, \$25,981.16, making, as above stated, \$60,265.79. The loss in the Mercantile branch was apparently much heavier than it really was by reason of the farm policies having been reinsured by the company in the Mercantile branch. The company shewed then that after

payment of all their losses they had still a surplus premium note capital of \$78,120.94.

In the report of the company of the 13th of March, 1873, it is stated the company's loss by the Ottawa fires, "added to other claims of that year, involved a loss of \$103,575.03, all drawn from our premium note capital, and partially anticipating its revenue for three years, must render the duties of its manager very arduous indeed."

It appears that on the 1st of January, 1873, the total policies in force were 18,200, of which 11,996 were cash policies. The losses in 1874 were \$64,539.51, and in 1875, "including such as are still unsettled," \$78,029.51. In 1875, the losses in the Farm branch, were \$4,815.12, upon 1841 policies, "being nearly three fold the usual ratio of farm losses;" and it was considered necessary to call in a further assessment upon that branch of 25 per cent, "which will exhaust the whole of the premium notes in that branch." The total premium notes were stated to be \$256,403.94; and the reserve fund, to provide for reinsurance of unexpired policies exclusive of unpaid guarantee stock, amounted to \$139,785.19.

Up to July, 1877, the state of affairs was that the liabilities of the company amounted to..... \$208,588.80

Being composed of liabilities to 1st Jan., 1877, as before stated	\$183,443.00
And from that date till 1st July following	25,145.80

The assets consisted of cash	\$6,548.71
Bills and notes at short dates.....	6,927.69
Assessments due on expired policies to 31st Dec- ember, 1876.....	10,408.56
Assessments due on existing policies	15,786.87
Division Court costs in good suits.....	1,000.00
Sundries	4,279.55
Premium notes	\$217,013.97
Less	\$64,552.10
Less above assessments....	15,786.87
	<hr/>
	\$80,338.97
	<hr/>
	\$136,674.00
	<hr/>
	\$181,626.38

The company being insolvent at the end of 1876, and not having complied with the provisions of the 38 Vic. ch. 20, D., procured the Act 40 Vic. ch. 72, D., to be passed enabling them to wind up their business. In pursuance of the last named Act, the company called in the whole of the unpaid amount of their premium notes to pay their debts, and the necessary sum for reinsurance.

The company in a notice of the 14th of September, 1877, calling in the balance of the premium notes, proposed to cancel the policies on payment of the premium notes of the insured parties, allowing them to deduct from such payment the necessary sum to effect a reinsurance themselves. The notice concluded: "Should you not remit the money by the time notified, your policy will become void. You will not be entitled to any rebate, and will have no claim against the company in case of loss, but will not be relieved from payment of the assessment, which, if not settled within thirty days, must be placed in the solicitors' hands for collection."

On the 23rd of March, 1878, the company notified the defendant they had cancelled his policy, the same having become void by non-payment of the assessment; and they offered to cancel the policy on payment of \$117.85, including costs and interest to date. The company had claimed from the defendant on his notes, which amounted to \$336, the sum of \$182.00 as his special assessment.

The subject of the division of the plaintiffs' business into branches has been very much discussed, and it will be proper to consider it in such respects as it may affect this case.

With regard to Mutual companies it would seem that as "every member shall pay his proportion of all losses and expenses, accruing to the company during the continuance of his policy," there should be but the one fund from which all claims on the company are to be paid, and which is to be contributed to by every member. It would require, therefore, legislative authority to depart from the principle of a general contribution or mutual principle

by permitting an assessment to be made upon a particular class of the members only. For that reason the legislature empowered Mutual companies by the Acts which the general statute, ch. 52, consolidated, to separate their business into two branches, and to keep separate accounts for each branch, and to make the members insuring in one branch liable only for the claims upon that branch.

As legislative authority is necessary in such a case, it follows that the power of establishing such branches, and the mode of carrying on business in them, and with them, must be pursued just as the statute has provided and declared. The powers of this company are derived from their Act of incorporation, the 32 & 33 Vic. ch. 70, D., although by it they have had given to them all the rights, &c., which were conferred upon Mutual companies by the General Mutual Insurance Act, ch. 52, before mentioned, and the several amendments thereof, excepting in so far as might be inconsistent with the 27 & 28 Vic. ch. 99, and with the Act of incorporation.

By that Act the company were empowered to divide their business into three branches, to be called: 1. The Farmers branch, comprising all the former risks of the (former) Beaver Mutual Life Insurance Association.

2. The Household branch.

3. The Mercantile branch; which two last named branches were to comprise all the now existing risks of the (former) Toronto Mutual Fire Insurance Company.

If the Act had not declared that the branches should *be called* by these particular names, they might have been called by any names which the company thought fit to give to them, so long as the particular business of each branch authorized to be carried on in it by statute was so carried on.

For instance, the General Act, Consol. Stat. U. C. ch. 52, sec. 11, authorized Mutual companies to separate their business into two branches; one for the insurance of isolated buildings and property not hazardous, and the other for insuring buildings and property hazardous, and

not hazardous. But the Act did not require that the two branches should be called by any particular names; and when the Toronto Mutual under that Act, before the union of the two companies, called the non-hazardous branch "The Household branch," and the hazardous and non-hazardous branch "The Mercantile branch," there could be no objection to it, so long as the non-hazardous business was carried on in the Household branch, and the other business in the Mercantile branch. But as the Act incorporating this company, the 32 & 33 Vic. ch. 70, D., has declared that the company were to call their business by certain specified names, they were bound to take such names when they divided their business into branches. They had no power under that Act to take any other names for their branches, or to divide their business into more than the three branches specified. But by the 36 Vic. ch. 101, D., they were authorized to carry on the business of insurance of *live stock*, which would be a fourth branch.

At the beginning of 1874, the company had the following branches : 1. Farm branch. 2. Mercantile branch. 3. Live Stock branch. 4. City branch. 5. Manufacturers branch, and 6. General branch. The first three of these branches were authorized by statute, but the last three were not.

In the beginning of 1875, The Manufacturers and Live Stock branches were discontinued, and "the then existing policies" in these branches, "were re-insured in the Mercantile or General branch, and can only be assessed according to their own special losses." And the Farm policies were to be issued thereafter in the Mercantile branch. See Report 26th February, 1875. That left the remaining branches, The General Branch and The City or Water Works branch. See report 21st February, 1876.

There were, however, a great many policies in the Mercantile, Manufacturers, Farmers, and Live Stock branches then outstanding, and the accounts with these branches were still continued, and assessments made on them. If the

business of the last named branches had been absolutely discontinued, or transferred to or vested in the General branch, there would have been a difficulty in the way of the company continuing business under such a head or designation as the *General branch*, because that is not the name by which any branch of the business, if divided into branches, was to be called. And if the name is to be considered as the *Mercantile* instead of the *General* branch, there is still the difficulty of transferring to and vesting in it, although an authorized statutory branch, the policies of the other branches, under which engagements had been contracted and liabilities incurred, which cannot be got rid of without the assent of all the policy holders whose policies have been cast into hotch pot, and whose rights and responsibilities were different from those attempted to be imposed upon them. The City, or Water Works branch, was opened under the 36 Vic. ch. 44, O., but, as has been seen, the plaintiffs had no power to do any business under that statute. The two branches therefore into which their business was divided in the beginning of 1875, the General and the Water Works, were neither of them authorized by the plaintiffs' *Act of incorporation*, nor by any other Act, and if the General means and is to be read and construed as the *Mercantile*, branch, then that *Mercantile* branch cannot have cast upon it, or be made to assume more than its own special liabilities without the consent of all of the parties interested. And it is of no consequence whether the defendant Spires became insured before or after the time of that attempted and unauthorized transfer of business.

If he became a member before the transfer he is a dissenting party to it, and if he became a member after it, he has the right to say the policies in the Manufacturers, General, and Water Works branches, were never rightful insurances by the company, because these were not authorized branches, and because the transfer of policies from one branch to the other was not made with the assent of all the policy holders interested. I think that is so, although

all premium notes taken by the company prior to the 1st of February, 1877, are declared by the Winding-up Act to be valid, and the proceeds are to be applied to the payment of liabilities incurred upon valid and subsisting policies, because the policies in these unauthorized branches were not, and are not *valid policies*.

I am of opinion from the evidence there was both a Mercantile and a General branch, and that the defendant was, or was professed to be, insured in the General branch, and that his insurance was and is therefore invalid, because the statute is, I think, imperative and not only directory as to the limit of the division of the company's business, and as to the names by which these branches were to be described. If he were insured in the *Mercantile* his policy would be valid.

The plaintiffs next contend, if the defendant Spires is liable, that he is so for the general losses of the company, and not only for the losses of the company in his own particular branch, and they say the language of section 4 of the Winding-up Act bears plainly that construction.

It will be necessary to look at the other enactments on the subject.

The Consol. Stat. U. C. ch. 52, sec. 13, provided that members insuring in one branch shall not be liable for claims on the other branch.

The 32 & 33 Vic. ch. 70, sec. 2, D., gave to the plaintiffs all the rights, &c., which mutual companies had by the above General Act, ch. 52, and the several amendments thereof; and, among them, the right to have three branches, with the restriction that the members of the one branch should not be liable for the losses of the other branch.

The 36 Vic. ch. 44, sec. 62, O., repeats the enactment contained in the former General Act, ch. 52, sec. 13, but it has no effect in this case.

The 31 Vic. ch. 32, sec. 5, O., declared that the holders of policies who paid their premiums in cash should not be liable to any further charge or assessment than the cash payment they had made, and that they should not be

members of the company unless constituted such by the by-laws of the company.

The Toronto Mutual Act, 31 Vic. ch. 52, sec. 2, O., makes the like provision when the insured pays in cash, excepting that they are not and cannot be made by by-law members of the company.

The Beaver Mutual Act, 27 & 28 Vic. ch. 99, sec. 2, made a similar provision to the one contained in the 31 Vic. ch. 52, O., last mentioned.

The 36 Vic. ch. 44, sec. 71, O., and the R. S. O. ch. 161, sec. 75, are to the like effect.

I refer to these last mentioned Acts only by way of illustration, that when separate rights have been given separate liabilities have been attached to these rights. The Acts themselves are not applicable or binding on these defendants.

It seems to be a fair and reasonable provision that those insuring in the one branch shall not be liable for the losses in another branch or branches, and so the Legislature has expressly declared ; and it seems also fair that those who pay cash premiums, which are made to bear a relative proportion to the amounts which are assessed upon premium notes, should not be liable for more than the cash payment they have made. That is, as a cash insurance for two years requires a payment in cash about equal to the assessments which are made upon a premium note in that time on policies of equal amounts, and on the like kind of property, it is only right the cash policy holders should make no further contribution than their cash payments.

It would seem unfair, then, that a person who has insured in one branch upon the positive engagement that he was not to be answerable for the liabilities of any other branch, should, in defiance of the engagement made with him, be made answerable for the liabilities of the other branches as well as his own, which must impose upon him a different and far greater responsibility than he ever contracted for.

Does then the Winding-up Act, section 4, impose any such enlarged or general liability ?

The words are that "all premium notes which have been taken by the said company prior to the first day of February, one thousand eight hundred and seventy-seven, shall be valid, and the same may be collected by the company and the proceeds applied to the payment of their liabilities, including all losses by fire incurred upon valid and subsisting policies prior to the passing of this Act; and everything necessary to a complete winding up of the affairs of the said company may be done and effected."

It must be assumed in discussing this question that all the policies are valid and subsisting policies, in respect of which the holders of them are called upon to make payment, and that the only question is whether the insured in one branch is bound by that Act to contribute to the losses by fire in another. It is only losses of that kind I am now considering.

The language of the statute is no doubt very general, and has not been expressed in terms accurately to protect the parties in their proper rights. The general idea of the Parliament seems to have been, that in order to have "a complete winding up" the company should collect the whole of their assets and pay all their liabilities from that common fund, and that is exactly what the company say has been enacted; and that they are therefore entitled to carry it out. But I think that is not necessarily the true interpretation of the Act.

In a case where there are two or more branches, the company is not liable for losses in a particular branch for more than the premium notes of that branch. Where the Winding-up Act directs the proceeds of the notes to be applied to the payment of the *liabilities* of the company, that is the extent of their liability.

A member of a particular branch sustaining loss cannot recover against the company, otherwise than to the amount of, or out of the amount of the premium notes of that branch—he has no claim upon the premium notes of any other branch. There is, therefore, no liability against the company to pay such a claimant out of the other branch funds.

In my opinion then the losses by fire are not to be paid out of the general assets of the company, but the losses of each branch are to be paid only from the premium notes of that branch. How then should the first item of \$26,351 —made up of losses in Water Works branch \$3,490 And in General branch..... 22,861 be disposed of. As regards Spires by striking out the sum of \$3,490, and holding him liable, if he is liable at all, for his share of the \$22,861, if his share as an insured member in the Mercantile or General branch can be ascertained.

And the like observations will apply to the other two defendants, by confining their respective liabilities to contribute only to the payment of the \$3,490.

As to the item for reinsurance, I think there can be no such claim made as to Spires, because the company on the 27th March, 1878, cancelled his policy for non-payment of his assessments. And as to Champness's policy numbered 65,947, upon which he is assessed \$288,98, there can be no charge for reinsurance, because it also was cancelled on the 21st of February, 1878.

As to the other policy of Champness, numbered 65,948, on which he has been assessed \$163.20, and as to Bradford's policy, they will be respectively liable for their particular reinsurance, if they are liable otherwise upon their policies.

As to Champness's policies, it may be here stated that he became insolvent and they were assigned to his assignee in insolvency, by the consent of the company, and they were accepted by the assignee, which would put an end to his liability. If the only objection were that the charge for reinsurance could not be sustained because the company had not paid the amount, the objection could not, I think, be maintained, because the Winding-up Act, sec. 5, says that "it shall be the duty of the said company to reinsure * * * all their valid and subsisting policies for the unexpired portion of the period which they have respectively to run, and the money required for the purpose of effecting such re-insurance shall be collectible upon the

premium notes held by the company in addition to the sums necessary to pay off the other liabilities of the said company ;" and as the company is to collect the amount for re-insurance on the premium notes, they must, to enable them to re-insure, necessarily collect it before they can re-insure, and it would seem that they are entitled to make this re-insurance whether the parties desire it or not, so long as there is a sufficient amount unpaid upon the premium note to effect the re-insurance, and so long as the member has not taken up his policy by paying all dues upon it.

The charge which the plaintiffs make for re-insurance is,

For the Water Works' Branch.....	\$1,149
For the General Branch.....	35,515
Total.....	\$36,664

And the way the company desire to collect it is by apportioning the total amount among the members according to the amount of their respective premium notes; whereas each member should be liable for his own particular insurance, irrespective of the re-insurances of the other members.

From what I have said Spires and Champness are not liable for this charge, and Champness besides, if he were liable, and Bradford also, are not liable for more than their own particular re-insurances—assuming their policies to be otherwise valid; but if their policies are not valid because made in a branch which it was not allowable to establish, the charge for re-insurance cannot for this cause be supported.

The item of guarantee stock, amounting to \$25,870, is said to be illegal because by-law No. 28 pledged the whole of the premium notes of the company in place of only two-thirds of their amount. The by-law did give in "security the premium notes held by the company," which meant the whole premium notes of the company; "and any investments made by moneys arising from payments on account of guarantee stock;" and "the profits of the company over and above all debts, losses, and expenses in each year, shall be placed to a reserve fund as additional security for the

ultimate payment of the guarantee stock, until such reserve is equal to the amount of such guarantee stock paid up from time to time."

The stockholders were also to be paid interest quarterly from 9 to 12 per cent upon their stock, according to the amount of it which they had paid up.

The statutes relating to such stock are the C. S. U. C. ch. 52, sec. 31, amended by the 27 & 28 Vic. ch. 38, sec. 6.

Under the former of these Acts, the "subscribers of such capital stock shall in respect thereof have such rights as the directors of the company declare and fix by a by-law to be passed before such capital is raised."

By sec. 32 of the same Act, the company may create from the surplus profits from year to year, and by 31 Vic. ch. 32, sec. 6, O., may levy an annual assessment on the premium notes, to form, a reserve fund for the purpose of paying off the guarantee capital, or by 31 Vic. ch. 32, sec. 6, O., paying off "such other liabilities of the company as cannot be provided for out of the ordinary receipts for the same or any preceding year."

And by section 33, the "company may make a periodical division of the profits of the company equitably among the stockholders and policy holders of the company after providing for the reserve fund."

The later Act above mentioned, 27 & 28 Vic. ch. 38, enacts that the directors "may pledge as much as, but not more than, two-thirds of the premium notes * * as security to the subscribers of such guarantee-capital."

The by-law is objectionable :

1. Because it pledges the whole, in place of only two-thirds of the premium notes of the company.

2. Because the stockholders were to be paid a dividend of from nine to twelve per cent. upon the stock according to the amount of it which they had paid up, without regard to there being profits, and without regard to the reserve fund being first provided for, which they had created, and without regard to the policy holders being entitled to an equitable division of such profits.

3. Because the by-law provides that, "The profits of the company, over and above *all debts, losses, and expenses* in each year, shall be paid to a reserve fund as additional security for the payment of the guarantee stock." So that if the whole profits of the company were to go to the reserve fund, there could be no profit out of which to distribute equitably any part among the stockholders and policy holders. But if it be said that the dividends secured by the by-law to the stockholders was a *debt* of the company, then it is certain that such a debt was not authorized to be created unless it was to be paid out of the *profits*, and in a certain order.

I am not satisfied the by-law is invalid altogether, although it is not sustainable in some respects. It is sufficient so far as the creation of guarantee stock is concerned, and the stock so subscribed is a debt of the company, and it remains a debt although the security pledged for its payment cannot be specifically enforced under the by-law and although some of the other provisions of the by-law are not warranted, or quite consistent. The stock being a debt of the company, the Winding-up Act makes all the premium notes of the company applicable to the payment of the liabilities of the company, and so the guarantee stock is an item rightly chargeable to the defendant.

The third item in the learned Judge's list, amounting in all to \$10,758, he held to be allowable, and it was not, I may say, really disputed, and as it is composed of bills payable, deposits, interest, salaries, and some other such items, it may be allowed to stand as a proper charge.

Mr. Thompson said it was chargeable wholly to the *General* branch, so it does not affect Champness or Bradford.

The fourth item in the list of the learned Judge, debentures \$83,800 remains to be considered.

The defendant says he is not answerable for that sum, because it was a debt contracted before he became a member, and the debentures were given for old debts; and because the issue of debentures was for an amount exceed-

ing one-fourth of the amount unpaid on the premium notes contrary to the statute.

The statutes provide, with regard to debentures, as follows:

Consol. Stat. U. C. ch. 52, sec. 57, authorizes the directors under by-law to issue debentures "for such sums, and to such an amount as may be necessary for the purpose of paying or of raising money by loan for the purpose of paying any loss or losses sustained by the company, or of expenses, or for other purposes of the company."

Section 58, "The whole amount of such debentures * * at any one time outstanding, shall not exceed one-fourth part of the amount then unpaid on the deposit or premium notes held by the company."

Section 59, "Such debentures * * shall not in any instance be drawn so as to become due and payable in more than twelve months after the issuing thereof." Extended to one renewal for a time not exceeding one year by 31 Vic. ch. 32, sec. 7, O. The Toronto Mutual, by 31 Vic. ch. 52, sec. 12, O., had power to renew from year to year.

Section 60, "Such debentures * * shall be paid solely out of moneys to be collected on the deposit or premium notes of members of the company." [See Toronto Mutual Act, 31 Vic. ch. 52, sec. 12, O.,] and not by new debentures, or notes, or money raised by the issue of new debentures. Or by 31 Vic. ch. 32, sec. 6, O., they may be paid out of the reserve fund, if it be necessary to do so.

Section 61, "The directors may always assess upon the members thereof in proportion to the amount of their deposit or premium notes respectively, such sum or sums as may be necessary to pay any such debentures * * then outstanding, and the interest thereon."

Section 66, "Every member of the company shall pay his proportion of all losses and expenses accruing to the company during the continuance of his policy."

Section 23, "At the expiration of the term of insurance, the note, or such part of the same as remains unpaid, after

deducting all losses and expenses occurring during the said term, shall be relinquished and given up to the signer thereof."

Section 82, "Except as provided in the 80th section" (as to one per cent. above the premium note), "no member shall be liable beyond the amount of his premium note."

Section 13, "The members * * insuring in one branch shall not be liable for any claims on the other branch."

It was argued by Mr. McCarthy, that as this company could issue debentures to one-fourth the amount of premium notes by the Consol. Stat. U. C. ch. 52, sec. 58, and as *The Toronto Mutual*, before its union with *The Beaver Mutual*, could issue debentures to one-fourth the amount of their premium notes under the special Act, 31 Vic. ch. 52, sec. 12, O., therefore *The Toronto Mutual* got additional power to issue debentures to the amount of two-fourths of their premium notes, and this company acquired that power by the effect of the Act of amalgamation of the two companies.

That is not the effect of the 31 Vic. ch. 52, D. Nor has the united company the power to issue debentures under their Dominion Act of Incorporation to a greater extent than one-fourth of the amount of their premium notes.

The company then had power to issue debentures for the purpose of paying losses or expenses, or for other purposes of the company, payable within one year, but renewable for one year longer. The issue of debentures was not to exceed one-fourth part of the unpaid premium notes, and they were to be paid out of the premium notes, or out of the reserve fund if it became necessary by a failure of the ordinary receipts to pay them out of the premium notes.

A member is only liable to pay his proportion of losses and expenses accruing "during the continuance of his policy;" and he is not liable (excepting it may be to the one per cent.) beyond the amount of his premium note.

These being the rules and principles by which the liability upon these debentures is to be settled, the next

enquiry is, how do the facts stand, subject always to the objection that the over-issue defeats the entire claim upon these debentures. The first item under the debenture claim amounts to \$55,000 for debentures held by the Ontario Bank issued in October, 1876, or immediately after it.

Mr. Thompson, the manager of the company's affairs, said: In 1874, the company owed the Ontario Bank \$13,814.66 for money advanced chiefly on notes of the directors. That sum was really a balance on the Ottawa loss of 1870, as Mr. Thompson says in his cross-examination. In 1875 the sum of \$1,829.95 was the balance of bills, &c., for that year, at the end of the year, discounted for the company. These two sums are included in the debentures for \$55,000 issued in 1876. The losses in 1876 amounted to \$76,000 odd; and the balance of the \$55,000 debentures, that is \$39,330.78, was, by Mr. Thompson's evidence, to meet these losses. Spires became insured on the 23rd of June, 1875. He is not liable therefore for the debt of 1874, \$13,814.66, nor are the others.

If there is any part of the sum of \$1,829.95 for discounts made after the 23rd of June, 1875, Spires is answerable for it. If after the 16th of July, 1875, Champness is also liable for it; but Bradford, who insured on the 3rd of June, 1876, is not answerable for it. These two sums are separable from the rest of the debentures for the reasons afterwards given. The losses for 1876 are stated in an exhibit to have been in that year \$76,252 62 in all the six branches.

If the debentures are valid in other respects, Spires and Champness may be liable for their *proportion* of the \$39,330.78, but what that proportion may be must be considered; that is, whether they are liable to contribute *ratably* to that general sum, or to contribute only to so much of it as relates to their own respective branches. Bradford, in any case, can be liable only for his proportion of the losses which accrued after the 3rd of June, 1876, and in his own branch.

The next debentures to be considered are those held by the Federal Bank, amounting to \$18,000. Mr. Thompson said they were given to retire notes discounted by the company at that bank, the company having got the money on the notes pledged with the bank in the latter part of 1875, or in 1876. The \$18,000 he said was required for losses in 1876. "I think," he said, "the \$18,000 was to pay losses of that year. * * I cannot tell to which particular losses the \$18,000 was applied."

If the debentures for the \$18,000 were given for losses in 1876, Spires and Champness must, if there be no other objection to the recovery, be answerable for their *proportion* of such losses. That proportion, as already mentioned, will have to be considered, and Bradford will be liable for his share of such losses which happened after the 3rd of June, 1876.

The remaining debentures are for \$10,800, which are held by the Bank of Montreal. The defendants assert they were given for some private transactions between the late J. H. Cameron and the company in no way connected with the business of the company, and that the members of the company cannot be made accountable for such matters.

The history of these debentures, as stated by Mr. Thompson, is as follows:—"Two debentures, \$5,000 and \$5,800, were issued in payment of liabilities on account of J. H. Cameron, and the company received guaranteed stock of Mr. Cameron and Mrs. Cameron for \$9,000. The two debentures represent by capital \$9,000. There had been a series of transactions arising out of his advances to the company,—drafts on England, which the company had repaid by acceptances, of which one was current at the time of his death for \$5,000, held by the Bank of Montreal. He made the advance in the fall of 1875 and spring of 1876. The advances were used for the expenses of the company. The amount of the advances always current was considered to be \$15,000. This was repaid by notes or otherwise. The acceptances in the Bank of Montreal were retired by debentures for \$5,000. The Bank of

Toronto debt on account of Mr. Cameron's stock was a different matter. His stock had been assigned to the company *in discharge of his liability to the company, viz., \$5,000 to the Bank of Montreal.* His executors pledged his stock. *The note for \$5,000 exceeded his advances, It would constitute an advance of \$5,000 to him personally.* The stock was transferred to me on behalf of the company to the extent of \$9,000 paid up stock, which he held as trustee for Mrs. Cameron. It was a transaction in respect of guarantee which is not shewn at all in the printed statement. There was no paper discounted in the Bank of Toronto except \$800. *But in order to get the \$9,000 stock transferred to me we assumed \$5,000 in the Bank of Toronto, and also the \$800. It was in effect a loan to his estate on the security of the stock, and so was the \$800.* We had no security for the \$5,000 in the Bank of Montreal, or the \$800 in the Bank of Toronto, and in order to secure it we assumed the further liability by taking the \$9,000 stock."

This statement shews that while the transactions between Mr. Cameron and the company began by his making advances to the company—they ended by the company making the advance of \$5,000 in or through the Bank of Montreal to him; and in order to get an assignment of the \$9,000 paid up guarantee stock which Mr. Cameron held as trustee for his wife, and which his executors made, the company had to assume Mr. Cameron's debt to the Bank of Toronto for \$5,800. If the executors of Mr. Cameron had the power, which does not appear, to assign over Mrs. Cameron's guarantee stock held by her husband in trust for her, I do not see why the payment off or acquittance of this \$9,000 paid up guarantee stock, which was a liability against the company to which the members were bound to contribute, should not stand as a valid charge against the members to the extent of the \$9,000 of stock so paid off. But that requires that the paid up guarantee stock should be shewn to have been reduced in fact by that amount. And that appears to have been done, because in

the account produced the guarantee paid up stock is stated to have been \$32,000, and the \$9,000 is deducted from it, so that the defendants must be liable either on the unreduced guarantee stock or on the debentures to the extent of \$9,000.

In the absence of evidence that Mrs. Cameron assented to the transfer of her trust stock, the \$9,000 should not be allowed as an item of charge against the members of the company. But evidence of the allowance by Mrs. Cameron of the assignment which has been so made of her property for her husband's debts may be given now, if it should be found that it would be of any service to the company to give it. If there is a liability, as I have already said, it will be on the \$55,000 debentures to the amount of \$39,330, that is, excluding old debts. And in like manner if there is a liability, the whole \$18,000 debentures can be charged against the members, and on the debentures for \$10,800, the sum of \$9,000 can be charged, subject to Mrs. Cameron's assent being given as before stated.

If they are chargeable to the extent so specified, or to any extent, to what extent and to what proportion of these sums is Spires liable?

It will be remembered that the members insuring in one branch are by the general provisions of the statutes, leaving out of consideration for the present the Winding-up Act of the company, liable only for the losses sustained by that branch. The company was authorized to issue debentures for the purpose of paying losses or expenses, or for other purposes of the company, and they were to be payable out of the notes held by the company, or, if necessary, out of the reserve fund, but as this company had no reserve fund, the case must be confined wholly to the premium notes. The Consol. Stat. U. C. ch. 52, sec. 61, says : "The directors of the company may always assess upon the members thereof in proportion to the amount of their deposit or premium notes respectively, such sum or sums as may be necessary to pay any such debentures * * then outstanding, and the interest thereon." Does that

enactment authorize an assessment to be made upon members *in proportion to the amount of their premium notes*, without regard to the purpose for which the debenture debt was incurred? If the debentures were given to pay losses occurring wholly in one branch of the company's business, can the members who are not insured in that branch be made to contribute to that payment? If they can, then the general provision of the statute is expressly violated in that respect. The statute must not therefore be construed so as to make one section of it repugnant and contrary to another section if it can be avoided. The section of the Act just referred to does not require that it should be construed in any way opposed to the other general provisions. The section does not say that *all* the members of the company shall be assessed, but merely that *the members* shall be assessed in proportion to the amount of their premium notes. And that language, read in connection with the above provisions of the Act, necessarily means that the members *who are liable to be assessed for that particular debt* shall be assessed in proportion to the amount of their premium notes. If a different construction be given to it, it would enable the directors when they pleased to make all the members of the company contribute to the losses of any particular branch or branches, by the simple process of first issuing debentures to raise money to pay the losses, and then of assessing the members generally to pay such debentures.

I am of opinion that the debentures are not to be ranked as a general liability to be contributed to by the whole body of members as of course, but that it must be ascertained how and for what purpose the debentures were issued. And then those members who were liable for the original debt, are those only who are to be or can be called upon to contribute towards that debt in its new form of a debenture.

For what part of the debenture debt of \$5,000 can Spires, if otherwise liable, be made to contribute? It

cannot be for more than the alleged new debt, said to have been formed of a portion of the losses of 1876, and amounting to \$39,330.78, as before stated. The losses for that year provided for by these debentures, were again said by Mr. Thompson to amount to \$34,000.

Mr. McCarthy, in his argument, deducted from the \$55,000,

Firstly, the balance of the Ottawa fire....	\$13,839
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Secondly, a sum borrowed from	
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the bank in 1871 of.....	\$23,936
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Less what was paid in 1872.....	2,480
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	_____	21,456
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	_____	\$35,295
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Leaving only the difference of \$19,705 for the losses of 1876.

I cannot make out the claim, from the evidence I have before me so low as Mr. McCarthy has done. Then, in a memorandum with the papers, it is shewn that in June 1875, the date of the earliest of these insurances, "the total discounts of the company were \$30,462.88, and in January, 1877, they were \$62,550, and therefore the difference of \$32,087.12 must have been legitimately assessable against Spires;" that is, as part of the Ontario Bank debentures for \$55,000.

I shall state this sum to be, for the purposes of this suit, \$34,000, which may be chargeable for new debts or for the losses of 1876 upon these debentures as against Spires.

As regards Champness, I do not see why he should not be liable for his share of the \$34,000, if he can be held to be otherwise liable, because there were losses on the Water Works branch in 1875 and 1876, according to one of the exhibits filed, amounting to a little more than \$7,000. By another exhibit it appears that a little over \$5,000 was paid by that branch for losses prior to June, 1876, and that the whole additional losses of that branch from May to September of that year were \$830, making the total losses against the Water Works branch to September 1876, only \$968.48.

Whether the \$5000 paid for losses prior to June, 1876, was paid by the debenture debt or by any part of it I cannot tell. It may be it is not, because in a memorandum made by Mr. Thompson among the papers, no part of any of the debentures is specifically charged. The liabilities of the Water Works branch is there made up, as follows :—

Claims unpaid	\$384 80
Due to General Branch for claims and expenses	3064 10
Rebates in lieu of re-insurance	6305 82
One-fourth expenses to July, 1877	3378 56
	—————
	\$13,133 28

But it may be that a part of the last mentioned sum has been paid off by the above \$5000; if so, then by adding to it the \$968 before mentioned there would be about \$6,000 of the Ontario Bank debentures to be debited to the Water Works branch, of which Champness, if otherwise liable, will have to contribute his share.

As regards Bradford, he is not liable for more of the Ontario Bank debentures than his share of the above sum of \$968, losses between the 1st of June and the 1st of September, 1876.

I cannot make out that Champness and Bradford should be charged with any part of the Federal Bank debentures for \$18,000, although they were given for losses in 1875 or 1876, because I cannot say that any part of them is made of Water Works losses.

I should say that no such losses are contained in them from Mr. Thompson's memorandum above referred to, shewing the Water Works liabilities to have been \$13,133.28 by the items there specially mentioned.

In any case Bradford is not liable, I think, upon either the Ontario Bank or Federal Bank debentures, although it may be that Champness, if otherwise liable, is so only to the extent of \$5,000, as before stated. I may say, before drawing the case to a close, that the company's affairs appear

always to have been represented to be in a very prosperous condition until the collapse came, and probably the outer members were somewhat surprised at it. As to the reserve fund of \$139,785.19 the evidence is: "There never was a reserve fund, except as it was so described in the language of the statute. We opened no reserve fund account in our books. Certain funds are spoken of in the statute as a reserve fund, and we never set apart any fund as a reserve fund."

In speaking of the Ottawa losses of 1870, they are represented in the report of 23rd of March as \$63,747.06 less \$3,481.27 covered by re-insurance, making the net loss \$60,265.79. In the evidence the loss is stated to have been "about \$83,000," and "some \$80,000"; and in the report of the 13th of March, 1873, they are said to have "involved a loss of \$103,000, all drawn from our premium capital." Again, the losses paid for 1871 are stated in an exhibit, headed "paid fire claims, &c.," to have been \$77,076.01, while the report shews the losses for that year were \$40,236.14, the rest being no doubt claims for previous years; and for 1872 paid \$34,674.90, while the losses were \$26,362.68.

I cannot therefore say whether the losses paid in 1876, stated to be \$76,252.62, were the losses for that year only, or covered payments made for previous years as well.

If any difficulty is occasioned to the company in the collection of their assessments, and in the final winding-up of their affairs, it must be assigned chiefly to the division of their business into branches to an extent which was not authorized by their charter. They may have done so in the belief that the 36 Vic. ch. 44, O., which does allow of an indefinite division into branches, extended to them; but it is not quite clear that such was the case, because in their report of the 13th of March, 1873 they refer to that measure as one which is about to become law; and they say: "This company being incorporated under a statute of the Dominion Parliament is not necessarily affected by the new measure."

The next cause of difficulty is the transferring of the business of one branch to the other by the mere order of the directors, or by the assent of the members present at a general meeting, without getting the assent of the respective policy holders.

A further cause of difficulty has been occasioned by not keeping the liabilities which accrued at particular times in such a way that the directors, as well as the policy holders, could tell what claims the respective members were answerable for, inasmuch as the policy holders are bound only for the claims which accrued during the continuance of their policies. The very large over-issue of debentures, and bills, notes, &c., before the debentures were given, is a further cause of difficulty. In these respects the statutes were a safe and perfect guide, and their provisions could have been easily followed. It is therefore by a direct infringement of their charter that the directors have brought all these difficulties upon the company, and now they claim the right of further violating the statute by throwing all their debts and liabilities into a common pool, and by making the members pay the whole of their premium notes to discharge these debts and liabilities, contrary to the agreement made with them when they became members, and contrary to the general provisions of the statutes. The result of which, as respects Bradford, would be to make him pay of his premium note for \$800 the sum of \$721 for about eight months insurance on a policy for \$8,000, while the actual losses and expenses accruing in that period would require scarcely more than about the one-fifth of the sum demanded.

There is the difficulty before mentioned of all of these defendants being insured in unauthorized branches.

It is true, it is said all the branches in 1875 were closed but the General and the Water Works branches, but that was not the case. The statement of fire claims paid from 1871 to 1876 shews that an account was kept by the company not only with the *Mercantile* for its own legitimate losses, but that an account was kept also with the

General branch as a separate independent branch of its own. If the account were really kept with the Mercantile, although it was called sometimes by that name and sometimes by the name of the General Branch, there might be no difficulty in the company recovering in such a case. But that is not so. The Mercantile was first of all made to swallow up several of the other branches, and then the General was intended to supersede it. But the company could not effect that, as there were so many policies still alive in all of the other branches, and they were obliged to continue keeping these branches separate in their books, and to assess them separately also down to the very last.

Upon the whole, therefore, I am of opinion that as the company have so plainly exceeded their powers by the division of their business into so many unauthorized branches, and have insured the defendant Spires in one of these improper branches, the plaintiffs have no right of recovery against him upon his premium notes.

And the like answer must be given in favour of the other two defendants, and for the like cause. If they could be made liable it would be for their share of the sum of \$3,490, the extent of the Water Works losses.

As to the second item for re-insurance there can be no recovery against Spires, because his policy, as before stated, was cancelled by the company in March, 1878, even if he were liable in other respects.

As to Champness, he is not liable upon the policy 65,947, because it was cancelled in February, 1878.

As to the policy 65,948 of Champness, and as to Bradford's policy, they could, if otherwise liable, be made answerable only for their own special share of risk, and not for a ratable proportion with the general policy holders in the Water Works branch, and what that special charge upon them would be I cannot tell from any information I have before me. It would be some part of the sum of \$1,149.

As to the third item of \$10,758 for bills payable, &c., Spires would, it was not much disputed, be liable for his

proportion, if he is otherwise liable, but the other defendants are not, as it does not apply to the Water Works branch. And as to the portion of the debentures for \$10,800, the defendants are liable in like manner to the extent of \$9,000 of that sum, and no more, if they are otherwise liable.

The objection of over issue of debentures was much insisted upon by the defendants. The statute, as before mentioned, enabled the company to issue debentures, "the whole amount of which at any time outstanding shall not exceed one-fourth part of the amount then unpaid on the deposit or premium notes held by the company." The amount of premium notes held by the company in or about October, 1876, when these debentures were issued—that is when about \$73,000 of the amount was issued—was about \$153,000. The debentures issued were therefore very much in excess of the limit imposed by statute. This company is not one which has, as many companies have, general borrowing powers.

When the *directors* of a company are prevented from borrowing, or from issuing debentures beyond a stated amount, and they exceed that amount, their act may be ratified by the company, if the company is one which has general borrowing powers, because the restriction in that case is upon the directors, and not upon the company.

In this case it is the *directors* who are empowered to borrow and to issue debentures; but I do not think that the company can ratify the excessive issue of debentures which the directors have made, because the company have not general borrowing powers, or any borrowing powers but those which are given to the directors, and because the prohibition "that the whole amount of debentures at any one time outstanding shall not exceed one-fourth part of the premium notes," contained in the statute itself, should be construed as a limitation upon the company as well as upon the directors.

The over issue of debentures was therefore an illegal act, and the debentures so issued in excess are void.

ON PLEAS, TRINITY TERM, 43 VIC., 1879.

I do not think the whole of the debentures, that is the whole issue of \$83,000, is invalid, but that the excess only of that amount is void. If the company had power to issue debentures to the extent of say \$40,000, and they issued debentures to that amount, and afterwards gave another debenture for \$5,000, it is the latter debenture only which would be inoperative. That, I presume, is quite plain. If the company, however, having power to issue debentures to the extent of \$40,000, made an issue to the amount of \$55,000 to the one person, it does not seem to me that the whole issue would be void, especially if issued in sums of which a certain number of them would make up the \$40,000, or any sum less than that. I am not satisfied the debentures would be invalid for \$55,000, if issued by one instrument. I am of opinion it would have been valid for the sum which was equal to one-fourth part of the premium notes, and void only as to the residue, by analogy to the exercise of authority under powers: *Sugden* on Powers, 8th ed., 519; *Eales v. Drake*, L. R. 1 Ch. D. 217; *In re Kerr's Trusts*, L. R. 4 Ch. D. 600; *Fountaine v. Carmarthen R. W. Co.*, L. R. 5 Eq. 316.

In this case I cannot tell how the debentures were issued, that is, in what sums or at what times. I infer from the evidence that the debentures for \$55,000, and for \$18,000, were issued before those for the \$10,000.

I do not think the enquiry upon the subject or the further discussion of it is of any kind of consequence, because if the debentures are all vacated, the debts which they represent (excepting only that \$9,000 can be claimed on those for \$10,000) are valid and binding debts upon the company, for which the holders of the debentures are entitled to rank against the company.

If the debentures formed any special charge upon the property of the company it might be of consequence to maintain the debentures, but as they do not, and as the notes hypothecated to the banks for the debenture debts are held by the banks as creditors generally, they are entitled to retain their lien although the debentures are entirely set aside. The debentures then, if valid in any

respect or to any extent, are a mere evidence of the debt against the company ; and, if they are not valid, or not valid for the excessive issue, the original debts which they represent, or were intended to represent, are still subsisting against the company and enforceable.

It is impossible that the debts can be extinguished because the securities given for it cannot be made available, or are not operative. I refer generally on this part of the case to *Re Pooley Hall Colliery Co.*, 21 L. T. N. S. 690 ; *Re Cork and Youghal R. W. Co.*, 21 L. T. N. S. 735 ; *Webb v. Herne Bay Commissioners*, L. R. 5 Q. B. 642 ; *Weeks v. Propert*, L. R. 8 C. P. 427 ; *Fountaine v. Carmarthen, R. W. Co.*, L. R. 5 Eq. 316 ; *Irvine v. Union Bank of Australia*, L. R. 2 App. Ca. (P. C.) 366.

The result is the amount of these debentures is (excepting as to part of the \$10,000 before mentioned), a valid and subsisting charge against the company to the extent of the binding debts of the company which the debentures truly represent, and that the objection to the over-issue is practically of no kind of consequence.

As to the fifth and last item. The guarantee stock amounting to \$25,870. All the defendants, if liable otherwise, are liable for their proportion of it.

If Spires be liable his account, as far as I can make it out, will stand as follows :—

1. Ratable share of loss to 1st January, 1877, amounting to	\$22,861
Or to some amount about that sum.	
3. Ratable share of the item for bills payable, &c., amounting to	10,758
4. A ratable share of the debenture item of \$83,800, in the whole, that is of about \$34,000 of the debentures for \$55,000	\$34,000
The Federal Bank debentures....	18,000
The \$10,800 debentures to the extent of	9,000
	61,000
5. Ratable share of the guarantee stock	25,870

6. Losses since 1st January, 1877, to 17th July, 1877, said to be	25,145
To what time these losses are made up I cannot say. They should stop at the 28th of April, 1877, the date of the Winding-up Act, 40 Vic. ch. 72, D. _____	
Total	\$145,634

If Champness be liable, his liability will be as follows, as well as I can make it out:

1. His share of the stated Water Works loss to 1st September, 1877, (see exhibit filed) ...	\$ 968
2. His share of re-insurance	1,149
3. His share of the debenture debt..... \$5,000 and of the 9,000 which is balanced by the reduction of guarantee stock, if Mrs. Cameron has ratified it or does ratify it..... ——————	14,000
4. His share of guarantee stock	25,870
Total.....	\$41,987

If Bradford be liable his share will, as well as I can make it out, be as follows:

1. His share of losses to 1st September, 1877, (see exhibit filed)	\$ 968
2. His share of re-insurance].....	1,149
3. His share of guarantee stock	25,870
4. And his share also of the above \$9,000	9,000
Total.....	\$36,987

But while I state Champness's and Bradford's liability (if liable at all) to pay their share, whatever that may be, of the respective sums just mentioned, I can by no means be certain that I am at all near the accurate amount in either case when I find the manager of the company in his memorandum has stated the whole claim against the Water

Works branch to be only \$11,644.87, and made up in a wholly different manner from the way in which it was presented at the trial, and from the way in which the learned Judge who tried the cause considered, and different also from the way in which the case was discussed before us. The particulars of that account are as follows. I give both sides of it:—

CITY WATER WORKS BRANCH.

<i>Assets.</i>	<i>Liabilities.</i>
1877, January 1.	1877, January 1.
Premium notes in hand, \$54,639 85	Claims unpaid \$ 384 80
Less paid in	Due General Branch... 3,064 10
1874.... \$1,187 91	Re-insurance at 15 per
1875.... 5,101 99	cent 8,195 97
1876.... 6,311 13	
—————	—————
12,601 03	11,644 87
\$42,038 82	Balance subject to ex-
Less 25 per cent. for bad	penses of winding up
debts and costs of col-	Compaay 19,884 24
lection 10,509 71	
—————	—————
\$31,529 11	\$31,529 11

I do not understand how it is possible to charge the Water Works branch with nearly \$20,000 for its share of the expenses of the winding up of the company, when its liabilities are not as much as \$12,000, or less than one-seventeenth of the total liabilities of the company in respect of all their branches.

Having now gone over the case, my opinion is, that all the defendants are entitled to succeed, because of their insurances having been made in branches which the company were not entitled to establish by statute, and that Champness is discharged by his insolvency, and by the acceptance of his assignee in insolvency in his stead by the company.

If I had been of opinion that the defendants, or any of them, were liable, that liability would only have been to the extent of their respective shares for the separate branch in which they were insured, and not for the general debts thrown by the company into hotchpot.

I should say that legislation may be required to disentangle this very complicated and embarrassing state of affairs.

The rule will be discharged.

GALT, J., concurred.

OSLER, J., took no part in the judgment, having been engaged in the case while at the Bar.

Rule discharged.

MEMORANDA.

During this Term the following gentlemen were called to the Bar :—

HENRY THEOPHILUS WARING ELLIS, PETER LEVINGTON PALMER, GEORGE TATE BLACKSTOCK, ALEXANDER JACKSON, JAMES ALEXANDER WILLIAMSON, GEORGE RICHARD WEBSTER, DUNCAN ARTHUR MCINTYRE, THOMAS WILSON CROTHERS, CHARLES WHITE MORTIMER, FRANK EGERTON HODGINS, JAMES MORRISON GLENN, CHARLES WESLEY COLTER, GEORGE CLAXTON, HUBERT LIGHTFOOT EBBELS, ANGUS JOHN MCCOLL.

SITTINGS IN VACATION AFTER TRINITY TERM.

THE CANADA AGRICULTURAL INSURANCE COMPANY V.
WATT ET AL.

Principal and surety—Guarantee bond—Change in mode of remuneration—Liability—Pleading.

Action on a bond given by the defendants W. and A., for the performance of W.'s duties as plaintiff's agent, and for the payment of all moneys received by him, alleging nonpayment of certain moneys, &c.

Plea by defendant A., setting up in substance that when he executed the bond as such surety W. was agent under an agreement with plaintiffs whereby his salary was fixed, and that afterwards and before breach, the plaintiffs, without A.'s knowledge or consent, discharged W. from his then engagement, and re-engaged or re-appointed him on different terms, &c., namely, that his remuneration was to be by commission allowed for services performed instead of by fixed salary.

Replication, in substance that W.'s remuneration as such agent, whether by fixed salary or commission, formed no part of and was not contemplated in the contract of suretyship, nor was the change in any way prejudicial to the surety's interests, nor did it impose any greater liability upon him, and the said change did not include any change of W.'s duties and obligations as such agent.

Held, by Cameron, J., replication bad, as being no answer to the plea, which alleged a discharge of W. from his engagement and a re-engagement on different terms.

Semble, that the change in the mode of remuneration by commission instead of by fixed salary would release the surety, if the nature of the remuneration was communicated to him when he entered into the contract, for it was an alteration that might be prejudicial to him.

A rejoinder alleged that A. was induced to enter into the said bond for W. at a fixed salary, and believing such representations to be true, executed said bond, and the change in said plea set out was without his authority or consent.

Semble, rejoinder good: that it was not necessary to allege that said representation was made by the plaintiffs, for under the rejoinder the plaintiffs would have to prove that the representation was so made as to be binding on plaintiffs.

DECLARATION in debt on a bond given by the defendants to the plaintiffs for the faithful performance by the defendant William Watt of the duties of an agent of the plaintiffs according to the requirements of the charter and by-laws, rules and regulations of the plaintiffs, and for the paying over and delivery to the plaintiffs of all money, record books, papers, or other property belonging to the plaintiffs, which should come into his hands as such agent, and for paying at maturity any and all bonds, mortgages, notes, due bills cheques or other evidences of debt which he might give to the plaintiffs on account of any indebtedness to them, &c. Averment that said agent, as agent of the plaintiffs as aforesaid, received large sums of money, also record books, papers, and other property of the plaintiffs, and that, although requested by the plaintiffs to pay and deliver over to the plaintiffs the said moneys, record books, and other property, he the said defendant William Watt, refused and neglected so to do, and converted and disposed thereof to his own use, &c.

Plea by defendant William Anderson : that he executed the bond as surety only for the defendant William Watt as such agent, as the plaintiffs well knew, and, as appears by the bond, the said William Watt then being the agent of the plaintiffs under an agreement with them, whereby his duties and obligations were defined and explained to the said William Anderson, and his remuneration was by fixed salary ; and afterwards, before breach, without the knowledge or consent of the said defendant, William Anderson, they, the plaintiffs, discharged the said William Watt from his then engagement, and re-engaged or re-appointed him as their agent on different terms and conditions, or altered the terms and conditions of his engagement as such agent, and remunerated him by a commission allowed for services performed, instead of paying him a fixed salary as before, an uncertain and fluctuating amount being substituted for a fixed and ascertained yearly salary.

Replication: that the method of remuneration of the said Watt as such agent by the plaintiffs, whether by

salary or commission, was no part of the contract when the said defendant Anderson became surety for the said Watt, and was not contemplated by the parties in the said contract of suretyship, nor was the change in that respect injurious to the interests of the said surety as such, nor did it impose any greater liability upon him, and the said change did not include any change of the duties and obligations of the said William Watt as such agent.

Rejoinder : that the defendant Anderson was induced to enter into the said bond or suretyship for the said William Watt as such agent at a fixed salary, and believing such representation to be true he executed the said bond, and the change in the plea set out was without his knowledge or consent.

To this rejoinder the plaintiffs demurred, on the ground that it is no answer to the replication, and does not allege or shew that defendant was induced to enter into the bond by any representation of the plaintiffs as to the salary.

The defendants also took exception to the replication : that it was no answer to the plea : that whether the mode of remuneration of the said agent formed part of the contract of suretyship or not, or was contemplated between the parties or not, the plaintiffs had no right to alter the terms of the agent's employment or of his remuneration without defendant Anderson's consent also : that the replication admitted that the plaintiffs, after the said bond of suretyship was given, had discharged the agent from his engagement in reference to which the bond was given, and thereupon the said bond of suretyship became from thenceforth null and void, and could not attach to a new hiring, or to a hiring or engaging upon another basis or on other terms.

On September 12, 1879, the demurrer and exceptions were argued.

Bethune, Q.C., for the plaintiff.

G. D. Dickson, for the defendant.

September 16, 1879. CAMERON, J.—If the parties by their pleadings intended simply to raise the question, whether a change in the salary or remuneration of the principal would relieve the surety from responsibility and terminate the contract of suretyship, they have failed to do so, for the plea alleges that the plaintiffs discharged the agent from his engagement and re-engaged him on different terms and conditions, and certainly the replication furnishes no answer to this allegation. The defendant is entitled to judgment on the exceptions to the replication.

It is unimportant to decide the sufficiency of the rejoinder, which is certainly very inartificially and carelessly drawn, but upon the ground of demurrer stated, that it is not alleged therein that the representation by which the defendant was induced to become surety was made by the plaintiffs, I think, upon the authority of *Young v. Austin*, L. R. 4 C. P. 553, I must hold it to be sufficient. The defendant would be required under this rejoinder to prove that the representation was so made as to be binding upon the plaintiffs, and so it is not bad on general demurrer.

As to the question whether the mere change in the terms of remuneration of a principal would terminate the contract of suretyship, the authorities leave it in a very unsatisfactory state.

In *Frank v. Edwards*, 8 Ex., at p. 214, where the contract of the principal was to serve the office of permanent overseer of the poor for the ensuing year, and from year to year, for the annual salary of £16, to be levied and paid out of the poor rates of the parish, and after several years when by reason of changes in the duties of the office making them lighter the salary was reduced to £14 a year, it was held the sureties were not discharged by reason of this change.

Parke, B., in giving judgment said, at p. 220 "The only question is, whether the reduction of the salary, which took place by an arrangement between the assistant overseer and the vestry, can be considered as a revocation of the original appointment. We are all of opinion it was not.
* * * The condition of the bond does not contain any

stipulation by which the sureties are to be exempted from their liability under the bond, in case there shall be a reduction in the salary. If the sureties had thought the amount of salary was an essential ingredient in the contract, they ought to have taken care to have had a stipulation inserted in the condition of the bond, that they would be liable only so long as the overseer was continued at the same salary."

In the *North Western R. W. Co. v. Whinray*, 10 Ex. 77, the surety bond recited that the railway company had agreed to appoint T. Latham as their clerk or agent at Lancaster for the purpose of selling coal for the company, at a yearly salary of £100 per annum, on his obtaining sufficient sureties for his duly and faithfully accounting to the company as therein provided. The condition made no reference to the salary or remuneration. Latham continued in the company's employment for some time at the salary named, which was subsequently changed to a commission of six pence per ton on all the coal for which he obtained orders, to which change Latham assented, and received a commission for some time. The commission amounted to a larger sum than the fixed salary. Latham became indebted to the company on account of moneys received by him, for which the surety was responsible if the change in the mode of remuneration did not discharge him. The Court held the surety was discharged.

Alderson, B., said, at p. 82: "The reasonable construction of this bond is, that the sureties undertook to be responsible for the faithful conduct of their principal whilst he continued '*such coal agent*,' that is, a coal agent at a yearly salary of £100. But when the mode of remuneration was altered the agency was different, and the risk of the sureties was materially increased. The case finds, that in point of fact the change was profitable to the principal; but it might have proved unprofitable, and that risk the sureties never undertook."

Platt, B., said, "The obligation which the sureties entered into was in respect of an agency at a certain salary, and

that is changed into an uncertain salary. The condition recites that the company have agreed to appoint the principal as their agent 'at a yearly salary of £100.' Therefore, there was a bargain between the company and the sureties that the agent should have that salary. That circumstance distinguishes this case from *Frank v. Edwards*, for there, as observed by my brother Parke in the course of the argument, the condition did not contain any stipulation that the appointment should be continued at the same salary."

Martin, B., said, "I am clearly of opinion that the defendant is not responsible. The case of *Lord Arlington v. Merricke*, 2 Saund. 411a, decided that, for the purpose of ascertaining the responsibility of a surety, the recital in the bond must be looked at as part of the contract. Here the recital is, that the company have agreed to appoint the principal as agent at a yearly salary of £100. * * An agency at a different salary altered the relation between the principal and sureties, in respect of which the latter agreed to become bound, and consequently they are not responsible."

In *Holme v. Brunskill*, L. R. 3 Q. B. D. 495, it was held that a surety was discharged from liability under the following circumstances: The bond recited that the plaintiff had agreed to let to G. Brunskill from year to year a farm called Riggindale, and a stock of 700 heath-going sheep, as regarded the arable land, from the 2nd February, 1873; as regarded the lands for pasturage and sheep, from the 10th of April, 1873, &c.; and further, that the sheep were delivered to G. Brunskill on the 11th of April, 1873, and consisted of the number, species, and quality mentioned in the schedule to the bond, and that it had been agreed that G. Brunskill, and R. Brunskill, and C. H. Norman, should enter into the bond for the redelivery of the said sheep or the offspring thereof in manner thereafter expressed; and the condition of the bond was, if the above-bounden G. Brunskill should, at the determination of the tenancy, deliver up unto H. P. Holme, along with the said

farm and premises, the like number, species, and quality of good and sound sheep as were delivered to the said G. Brunskill as aforesaid; and in case the said stock of sheep should, at the determination of the said tenancy, be reduced or deteriorated in number, quality, or value, should pay H. P. Holme compensation for such reduction or deterioration, to be ascertained by certain arbitrators in manner therein provided, and should yearly and every year during the tenancy pay, or cause to be paid to H. P. Holme, by way of rent or interest for the sheep, the sum of £35, by two equal half-yearly payments, then the bond should be void. On the 9th of November, 1875, the landlord gave to G. Brunskill a notice to quit the farm and lands on the 10th of April, 1876, or at the expiration of the year of the tenancy which should expire next after the expiration of one-half year from the service of the notice. On the 8th of April G. Brunskill declined to accept the notice to quit on the ground that it was bad, and on that day an agreement was entered into between the parties, as follows: "I agree to give up the field called 'Bog,' now in my occupation, to my landlord, my yearly rent to be reduced by £10, also to give entry to the same on the 10th of April next, and to give up any claim I have to the use of the building known as the 'Stick Barn.'—G. Brunskill." The notice to quit was then withdrawn, and G. Brunskill then continued tenant of the farm, less the Bog Field, at the reduced rent. On the 5th of October, 1876, the landlord gave Brunskill notice to quit on the 10th of April, 1877, which was admitted to be a good notice. Before that day he filed a petition for liquidation of his affairs by an arrangement with his creditors, and the trustees of his estate gave up possession of the farm to the landlord on the 29th of March, 1877. It was afterwards ascertained by arbitrators, as provided by the bond, that the flock of sheep was reduced in number and deteriorated in value and quality, and they assessed the damages at £132. It was proved that the Bog Field was a field in which sheep did not usually pasture, but that it was occasionally used for the pasturing of sheep to the

extent of twenty-five at a time being placed on it, and that it was also used during the lambing season ; that the giving up the field would make an appreciable difference to the tenant in the spring, and that it might make a difference of fifteen in the number of the sheep that the farm would carry, and that it would compel the tenant to find hay either for the cattle or sheep elsewhere. The learned Judge left it to the jury to say whether the new agreement had made any substantial or material difference in the relation between the parties, as regarded the tenant's capacity to do the things mentioned in the condition of the bond, and for the breach of which the action was brought. The jury answered the questions in the negative. The trial took place before Denman, J., who held that there had been a change in the tenancy created, and gave judgment in favour of the defendant on that ground, and thought that the question whether an alteration in the terms of the agreement between the principals was such as to affect the surety in any way by substantially or materially altering the risk, was one for the jury.

In appeal from this judgment before Cotton, Thesiger, and Brett, L.J.J., it was held there was no change of tenancy ; but by Cotton and Thesiger the change in the terms of the agreement without his consent discharged the surety, and that it should not be left to the jury to say whether the change was material to the risk or not, that being a matter for the consideration of the surety alone.

In giving his judgment Cotton, L.J., uses this language, at p. 504 : "The plaintiff's contention was that this" (the answer of the jury) "must be treated as a finding that the alteration was immaterial, and that, except in the case of an agreement to give time to the principal debtor, a surety was not discharged by an agreement between the principals made without his assent, unless it materially varied his liability or altered what was in express terms a condition of the contract. In my opinion this contention on behalf of the plaintiff cannot be sustained. * * * The true rule in my opinion is, that if there is any agreement between the

principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without enquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged ; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an enquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged. * *

The case of *Sanderson v. Aston*, L. R. 8 Ex. 73, was specially relied on by the plaintiff. But Martin, B., though he did not formally dissent from the decision of the majority of the Court, was not satisfied with the judgment ; and if the decision is to be considered as based on the reason given by Pollock, B., that the Court was entitled to consider whether the alteration was material, it cannot, in our opinion, be sustained."

From this view Brett, L. J., dissented, upon the ground that the finding of the jury, approved by the Judge at the trial, that the alteration was not material, must be accepted and acted on.

In the *Croydon Gas Co. v. Dickinson*, L. R. 2 C. P. D. 46, Amphlett, J. A., at p. 51, states the rule to be, "that when time is given, or the position of the surety has been altered by the dealings of the principals, the surety is discharged. That must, however, be taken with certain limitations ; that is to say, if it depends upon enquiry, the Court will not go into that enquiry, and unless the fact is self-evident, the Court will not consider the question : and of course the rule will not be applicable where the change cannot be otherwise than advantageous to the surety."

In *Sanderson v. Aston*, L. R. 8 Ex. 73, already referred to, Kelly, C. B., says, at p, 76 : " And if it clearly appeared that the surety had entered into the agreement on the faith of the original contract, that is, if notice had been given to him of the terms of the contract, and he had, after that notice, entered into this bond, he would undoubtedly have been discharged by the alteration."

Were it necessary for me to decide this simple question on this demurrer, does the change that took place in the remuneration of the principal, by the substitution of a commission for a fixed salary, discharge the surety, I should have great difficulty in doing so ; but I incline to the view that it would if the nature of the remuneration was communicated to him, as it is an alteration in the relation of the principals that may or may not be prejudicial to the surety, and so involves enquiry. It would then be for the surety alone to say whether he would consent to the change and continue to be bound, and the option not having been given to him, he is discharged.

I base my present judgment upon the sole ground that the plea as pleaded sets up a complete abandonment of the original contract between the principals and the entering into a new one, in reference to which the defendant assumed no responsibility, and the replication is no answer to the defence thus presented.

Judgment for defendant.

THE OTTAWA AGRICULTURAL INSURANCE COMPANY V. THE
CANADA GUARANTEE COMPANY.

Guarantee policy—Representation as to prior default.

To an action on a guarantee policy for the due performance of B.'s duties as plaintiffs' secretary, alleging default in paying over moneys, the defendants pleaded that the plaintiffs, in order to induce defendants to enter into the contract, represented and warranted to defendants certain facts material to be known to them, as follows: that the said B. had never been in arrear or default in his accounts; yet the said B. had prior thereto been in arrear and default in his accounts while in the employment of one R. B.

Held, by OSLER, J., plea good; for that the representation was not necessarily restricted to a default made while in plaintiffs' service, and what it really extended to might be shewn at the trial.

DECLARATION, on a policy of guarantee, dated 1st of September, 1875. After reciting that one James Blackburn had been appointed secretary in the service of the plaintiffs, and had been required to find security for the performance of his duties in the said situation, and that the defendants had agreed, upon the terms and subject to the provisoes and conditions thereafter contained and endorsed thereon, to become such security to the plaintiffs, it was witnessed that the said defendants, fully relying on the truth of the declaration contained in a certain statement or document distinguished as Employers' Guarantee Proposal, No. 1860, dated 12th of August, and signed by J. Skead, the plaintiffs' president, on behalf of the plaintiffs, and lodged with the defendants at their office in Montreal, and on the strict performance and observance thereafter by the plaintiffs of the contract thereby created, did thereby covenant with the plaintiffs to re-imburse unto the plaintiffs the amount of any loss, not exceeding in the whole the sum of \$4,000, which, during the continuance of the said policy, should be sustained by the plaintiffs by reason of any act of fraud or dishonesty of the said James Blackburn in his said employment, &c. And it was by the said policy provided, that it should remain in force so long only as the contract by the said declaration created should be strictly performed and observed by the plaintiffs. And the plaintiffs accepted the security

aforesaid, and employed the said James Blackburn as aforesaid; and after the making of the said policy, and the acceptance thereof by the plaintiffs as aforesaid, and during the said employment by the plaintiffs of the said James Blackburn, and whilst the said policy was in full force, the said James Blackburn, in his said employment, received for the plaintiffs from divers persons divers large sums of money, amounting in the aggregate to a sum exceeding \$4,000, which moneys the said James Blackburn fraudulently and dishonestly appropriated to his own use, and has never paid over to the plaintiffs, whereby the plaintiffs sustained great losses exceeding in the whole the sum of \$4,000; and although all conditions have been performed, &c., yet the defendants have not paid or made good, or reimbursed unto the plaintiffs the said loss to the amount of the said \$4,000 by said policy guaranteed as aforesaid, but have therein wholly made default.

Thirteenth plea: that the said plaintiffs, in order to induce the defendants to enter into the said alleged contract, then represented and warranted to the defendants of and concerning certain facts and circumstances material to be made known to the defendants in order to enable them to judge of the risk about to be undertaken as follows: that the said James Blackburn had never been in arrear or default in his accounts, yet the said James Blackburn had, previously to the said representation and warranty, been in arrear and in default in his accounts while in the employment of one Robert Blackburn.

To this plea the plaintiffs demurred on the grounds:

1. That the said plea shews no duty cast upon the plaintiffs to represent or warrant the conduct of James Blackburn in the employ of any persons other than the plaintiffs.
2. That there is no knowledge by the plaintiffs of the default of James Blackburn while in the employment of Robert Blackburn alleged, and therefore the plea is bad.
3. That it is not alleged James Blackburn was in default in his account with the plaintiffs.

4. That the said plea affords no answer to the declaration to which it is pleaded.
5. And on other grounds appearing in said plea.

On September 30, 1879, the demurrer was argued.

J. K. Kerr, Q.C., for plaintiff, referred to *Municipal Corporation of East Zorra v. Douglas*, 17 Grant 462; *North British Ins. Co. v. Lloyd*, 10 Ex. 523; *Owen v. Homan*, 3 McN. & G. 378; *De Colyar's Law of Guarantees*, 282, 285-6; *Brandt on Suretyship*, p. 457, sec. 341.

H. J. Scott for the defendant.

October 3, 1879. OSLER, J.—I think the plea is perfectly good. The defence is not put on the ground of warranty, which could not be sustained in the present form of the plea, but on the ground of misrepresentation of a fact material to be known to the surety.

The plaintiffs urge that the statement must necessarily refer to a default made by Blackburn while in their employment.

But if the declaration is read, as I think it ought to be, as stating a policy made before Blackburn entered upon that employment, such a construction would be senseless.

On the other hand, if the policy was taken and the representation made after Blackburn had been for some time in their service, the representation as pleaded is wide enough to cover a default not only during that service but in any former one.

I cannot say as a matter of law that it must be necessarily confined to one or the other. The plaintiffs may have determined to take the risk of the statement proving incorrect, and there was certainly nothing to prevent them from vouching for Blackburn's fidelity to all his former employers. What the representation really extended to may, I apprehend, be shewn at the trial.

The cases cited do not apply. They deal with the question of concealment. Here actual misrepresentation is charged.

The defendants are entitled to judgment on demurrer.

Judgment for defendant.

MICHAELMAS TERM, 43 VICTORIA, 1879.

(November 17th to December 6th.)

THE HON. ADAM WILSON, C. J.

" " THOMAS GALT, J.

" " FEATHERSTON OSLER, J.

SEVERN v. CLARKE,

Chattel mortgage—Present advance—Purchase by mortgagee at bailiff's sale—Effect of—Affidavit of bona fides by joint mortgagee.

F. owed the plaintiff and M. \$200 and \$100 respectively for goods supplied to them, and had given a chattel mortgage on his property to Flint for \$600. Being pressed by Flint, he applied to the plaintiff and M. for the money, offering them a chattel mortgage therefor as well as for what he already owed them, which they agreed to, but not having the money at the time, they borrowed it from J., giving him their note endorsed by F., and Flint was paid off and his mortgage discharged. F. gave to the plaintiff and M. the mortgage in question, which was in the usual form, the expressed consideration being \$900; The affidavit of *bona fides* was made by the plaintiff alone, and stated that the mortgagor was justly and truly indebted to him and M. as the mortgagees therein named in the sum of \$900 mentioned therein, &c.; and on the renewal of the mortgage the affidavit was made by plaintiff in like manner. The plaintiff and M. were not connected in business. The note was renewed several times, F. being a party to only one of the renewals. Some months after the mortgage was given the plaintiff and M., to protect themselves, bought in the goods at a bailiff's sale for rent and taxes, and they were subsequently seized on an execution at the defendant's suit, when the plaintiff and M. claimed, and an interpleader was directed.

Held, that the mortgage was valid : that the evidence, more fully set out below, shewed that it was given for a present advance by the mortgagees, and not merely as security for a liability incurred as accommodation makers of the note, so as to bring the transaction within sec. 6 of the Chattel Mortgage Act.

Held, also, that the fact of part of the consideration of the mortgage consisting of separate debts to the plaintiff and M. did not prevent the plaintiff making the affidavit of *bona fides*, the first section of the Act not being limited to cases of joint mortgagees connected in business, &c.

Held, also, that the plaintiff and M. acquired a good title as purchasers at the bailiff's sale, and that such sale was not within the Act so as to require the registration of a bill of sale, or an actual and continued change of possession ; but, *Semble*, that the plaintiff and M. could also rely on the mortgage.

Held, therefore, that the plaintiff and M. were entitled to recover.

THIS was an interpleader issue, tried before Patterson, J. A., and a jury, at Belleville, at the Fall Assizes of 1879, to try the title of the plaintiff to certain goods seized by the sheriff of the County of Hastings, under an execution at the suit of the defendant against one Farrell.

The plaintiff claimed title under a chattel mortgage, dated 21st of February, 1879, from Farrell to himself and one Mulkearn, of the goods in question, securing \$900, payable in monthly instalments of \$50 per month, with interest at ten per cent., the first instalment being payable on the 21st of April, 1879.

Farrell was an hotel keeper, and he owed the plaintiff \$200 and Mulkearn \$100, for provisions supplied to him. He had given a chattel mortgage on his property to one Flint, on which about \$600 was due, and Flint was pressing him for payment. He applied to the plaintiff and Mulkearn to assist him, offering to give them a chattel mortgage to secure what they might advance, and the amount he owed them besides. They agreed to do so, but not having the money at their command, borrowed it from Mr. Morgan Jellett, giving him their note therefor endorsed by Farrell. The money borrowed was paid to Flint, whose mortgage was discharged, and Farrell then gave the plaintiff and Mulkearn the mortgage now in question.

This mortgage was in the usual form, the expressed consideration being \$900, money advanced to the mortgagor.

The affidavit of *bona fides* was made by the plaintiff, who was described as "one of the mortgagees in the within mortgage named," and stated that the mortgagor was justly and truly indebted to him and one Mulkearn as "the

mortgagees therein named, in the sum of \$900 mentioned therein", &c., &c.

The plaintiff and Mulkearn were not in partnership, nor in any way connected in business.

The note given to Jellett was renewed several times, and there was still \$100 due upon it at the time of the trial. Farrell was a party to only one of the renewals. He paid \$150 on account of the note, which was credited on the mortgage. The rest was paid by the plaintiff and Mulkearn.

A renewal of the mortgage was filed by the plaintiff on the 20th February, 1879. The statement of the plaintiff, attached to the copy filed on the renewal, set out the interest of the plaintiff and Mulkearn in the goods and chattels described in the mortgage: that the mortgage was made to secure the sum of \$900 for money advanced: that the mortgage had not been assigned: that the balance due for principal and interest, after crediting \$150 and interest thereon, was \$828.75, and concluded, "I am interested with the said Peter Mulkearn in the said mortgage and in the property therein described, as mortgagees for the sum of \$828.75. The above is a true statement of the amount of principal money and interest due to me and the said Peter Mulkearn on the said mortgage." The usual affidavit of *bona fides* was also filed.

The plaintiff also claimed title as purchaser of the goods at a bailiff's sale for rent and taxes.

In May and June, 1878, the goods mortgaged to the plaintiff and Mulkearn were distrained for arrears of taxes, \$123, and arrears of rent, \$536.20. Both warrants were held by the same bailiff.

The plaintiff consulted a solicitor, who advised him to attend the sale and buy the property in to protect or secure himself. He and Mulkearn and a few others were present at the sale.

The plaintiff said: "The bailiff went through from one room to another and offered the stuff in each room. I bought some rooms and Mulkearn others. I bought in merely to secure myself. I had not spoken to any one

interested about the sale. It was not brought about by me. * * I paid \$360 odd to the bailiff. * * Mulkearn and I bought to the same amount within \$20. * * The transaction was straightforward as far as I was concerned. Farrell continued to occupy the premises after the sale. * * The day after the bailiff took us through the rooms and delivered the stuff to us."

At the close of the plaintiff's case a nonsuit was moved for on several grounds, all of which the learned Judge overruled, reserving leave to the defendant to move.

The defendant called a great many witnesses for the purpose, apparently, of proving that the plaintiff had permitted Farrell to remove many of the goods, and had possibly got the benefit of them himself; also to shew collusion as to the bailiff's sale, &c.

The nature of the learned Judge's charge and the objections made thereto, as also the grounds on which the nonsuit was moved, will appear from the rule *nisi*.

The jury found a verdict for the plaintiff, and found that both the transactions, viz., the mortgage and the purchase at the bailiff's sale, were *bona fide*.

In this term, November 27, 1879, Ferguson, Q. C., obtained a rule calling upon the plaintiff to shew cause why the verdict should not be set aside and a nonsuit or verdict entered for the defendant pursuant to the Common Law Procedure Act, or for a new trial, on the ground that the verdict was contrary to law and evidence, for the following reasons:

1. The chattel mortgage under which the plaintiff claimed title to the goods in question was invalid against creditors, because it was shewn to be really a mortgage to secure the mortgagees against a liability incurred for the mortgagor by signing a promissory note as makers for their accommodation as to part of the consideration, and did not set forth fully by recital or otherwise the terms, nature, and effect of the agreement between the parties, nor was such agreement shewn by any writing whatever, nor did it appear that such liability did not extend for a longer

period than one year, and the renewal of the said mortgage was clearly bad, as it did not fulfil the requirements of the statute in respect to renewals of chattel mortgages, and so the alleged title of the plaintiff under the chattel mortgage and renewal thereof failed as they were both void, and the defendant was a creditor of the mortgagor.

2. The alleged title of the plaintiff as a purchaser of the goods at the sale for rent and taxes was not sustained by the evidence, because it was shewn that the sale to him was not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the goods, or any delivery or change of possession whatever, and it was not shewn that there was any writing or conveyance of the goods registered as required by the statute, and such sale or pretended sale or purchase was void as against creditors, and the defendant was a creditor within the meaning of the statute.

3. The evidence shewed that the said mortgage and the renewal thereof, as well as the alleged purchase of the goods, were for the purpose of protecting the goods against the claims of the creditors of the mortgagor.

4. That by the purchase of the goods the plaintiff was estopped from setting up title as mortgagee of the same goods.

5. That the affidavits of the plaintiff attached to the mortgage, and the said renewal thereof, were insufficient, as, although the plaintiff was one of the mortgagees, still he was not, under the circumstances disclosed, authorized to make the affidavits or either of them.

6. That the plaintiff did not shew any title to the goods, either by virtue of the mortgage or the said purchase and sale.

7. The evidence shewed that at the time of the making the mortgage the mortgagor was on the eve of insolvency, and not in a position to make the mortgage.

And for misdirection of the learned Judge who tried the cause, in telling the jury that the statute which provides that a person in insolvent circumstances, or believing himself

to be on the eve of insolvency or unable to pay his debts in full could make a valid transfer of goods, had no operation in the case. And in telling the jury that both the said mortgage and the said sale and purchase might be good and valid.

CORBY ET AL. V. CLARKE.

This was another interpleader issue, arising out of the seizure under the execution referred to in the last case.

The plaintiffs claimed under an assignment from P. Mulkearn to the plaintiff, Henry Corby, Jr., of the goods bought by him at the bailiff's sale for rent and taxes.

This assignment was dated 31st December, 1878. By t Mulkearn, in consideration of \$100, assigned and transferred all his interest in the goods, &c., of Farrell, sold under the warrant, as appeared in the the schedule or inventory annexed ; and he agreed to execute all further conveyances which might be necessary. On the 8th of January, a chattel mortgage was given on these goods by Mulkearn to Henry Corby, Jr., and James Corby, the plaintiffs, reciting the mortgage from Farrell to Mulkearn and Severn and the sale under the warrants, and that Mulkearn had agreed to give security to the plaintiffs for the debt he was then owing to them, and therefore executed the mortgage as collateral security.

A verdict was entered for the plaintiffs following the result of *Severn v. Clarke*, subject to all the questions affecting that case, and to any further question arising on the assignment from Mulkearn to the plaintiffs.

In this term, November 27, 1879, *Ferguson*, Q. C., obtained a rule *nisi* on the same grounds as in the last case, and on the further ground that the alleged assignment from Mulkearn to the plaintiffs under which they claimed title was invalid.

During the same term, December 3, 1879, both rules were

argued together. *McMichael*, Q.C., and *John Crickmore*, shewed cause respectively for the plaintiffs, Corby et al., and Severn. There is nothing in the objection as to the *bona fides* of the mortgage. This was expressly left to the jury, and they found in the plaintiffs' favour, and their finding is fully supported by the evidence. As to the other objections. The mortgage was not given merely to secure the mortgagees as accommodation makers of the note, but the mortgage was given for a present advance by the mortgagees, namely, money actually paid by them for the mortgagor, the transaction merely assuming the shape of a note as the mortgagees had not the money on hand at the time, and therefore the sixth section of the Act R. S. O. ch. 119, in no way applies so as to require the requisites of that section to be complied with. The affidavit of *bona fides* by one of the mortgagees was sufficient. The first section expressly provides that the affidavit may be made by one of such mortgagees, and is in no way restricted to the case of mortgagees connected in business. The case of *McLeod v. Fortune*, 19 U. C. R. 100, is expressly in point. There it was decided that an affidavit made by one of two joint bargainees was sufficient, though the consideration was made up of two debts due to the bargainees separately. No estoppel arises by reason of the mortgagees having bought at the bailiff's sale, as the evidence shews that they bought merely for the purpose of protecting their interests, and treated the mortgage as still subsisting. The plaintiffs can rely on their title acquired at the bailiff's sale. The statute does not apply to such sales, so as to require an actual and continued change of possession or a registered bill of sale: *Kissock v. Jarvis*, 6 C. P. 393, 396. The purchaser at such sale could not make the affidavit required by the Act, as the bailiff is not the owner of the goods, but the landlord or other person for whom he acts in making the sale. There was, however, a change of possession here. The goods were in the possession of the bailiff, and they were delivered by him to the purchasers.

Ferguson, Q. C., contra. The mortgage was not given

for a present advance : if it had been, Farrell would not have been a party to the note. The mortgagees merely signed the note for Farrell's accommodation, and the mortgage was given in security therefor. It therefore comes within the sixth section of the Act, and as none of the requirements of the section have been complied with, the mortgage is invalid. Then as to the affidavit of *bona fides*. The statute applies only to mortgagees who are connected in business and have a joint interest, and conversant with all the circumstances, for otherwise it would be impossible for one of such joint mortgagees to make the affidavit ; and a very strong presumption is raised in favour of this contention, from the fact of this being required in the case of an agent making the affidavit. The contention is borne out by the requirements of the tenth section as to the renewal of mortgages. Moreover the plaintiffs must fail, so far as the mortgage is concerned, because they were only respectively claiming part of the goods contained therein, and their interest as mortgagees was a joint one. The plaintiffs purchasing at the bailiff's sale were estopped from setting up title under the mortgage : *Parkinson v. Higgins*, 37 U. C. R. 318, 40 U. C. R. 274. The plaintiffs must therefore rely on their titles acquired as such purchasers. The sale, however, cannot be supported. It clearly comes within the statute, so as to require a change of possession, or a registered bill of sale. There is nothing to prevent the affidavit being made, for all that is required in the affidavit is, that it should state that the sale is *bona fide* and for good consideration.

December 27, 1879. OSLER, J., delivered the judgment of the Court.

Nothing turns upon the third or seventh grounds taken by the rule *nisi*, or as to the first of the alleged grounds of misdirection. The finding of the jury as to the *bona fides*, both of the mortgage and of the bailiff's sale, is fully borne out by the evidence.

The case turns altogether upon the sufficiency of the

chattel mortgage and the bailiff's sale, as against the technical objections.

If the plaintiff can support a title under either, he must succeed.

As to the mortgage, it was urged that the transaction was one within the 6th section of the Act respecting mortgages and sales of personal property, and that the mortgage was really given to secure the mortgagees against a liability incurred by them for the mortgagor, and was void because the liability incurred was for a longer period than one year, and the terms, nature, and effect of the agreement, &c., were not fully set forth by recital or otherwise.

In short, the defendant contends that the mortgage was not given to secure a present advance by the mortgagees, but really to secure them against their liability upon a note which they had signed for the mortgagor's accommodation.

In our opinion the inference fairly to be drawn from the evidence is, that the mortgagees agreed to advance, and did advance, the money. They had to borrow it in order to do so, it is true; but the fact that they or the lender required in the first instance that Farrell should endorse the note given by them, does not necessarily repel the inference which, we think, should be drawn from the rest of the evidence; and unless the transaction is brought clearly within the danger of the Act, we ought, if possible, to support it, especially where its *bona fides* is not impeached.

So far as this objection is concerned, we think the evidence shews that the mortgage was given to secure money paid by the mortgagees for the mortgagor, and is therefore not within the 6th section of the Act.

The next objection to the mortgage and renewal is, that under the circumstances Severn could not make the affidavits of *bona fides*, as part of the consideration consisted of separate debts to himself and Mulkearn. And it was argued that, although the first section permits one of several mortgagees to make the affidavit required by that section, the spirit of the Act requires that it should be so

construed as to limit it to the case of joint mortgagees who are connected in business, either of whom would be aware of all the circumstances connected with the mortgage. And an argument in favour of this construction was attempted to be drawn from the fact that when the affidavit is made by an agent it is required that he shall be aware of all the circumstances connected with the mortgage and properly authorized in writing (by the mortgagees) to take the mortgage.

We think this objection is not tenable. The language of the statute is plain, and there is no reason why we should assume that one of two joint mortgagees, even if not connected in business, may not be capable of taking an affidavit with a full knowledge of all the circumstances.

As Harrison, C. J., said in *Morrow v. Rorke*, 39 U. C. R. 500, at p. 505: "It is much safer for the Court to read the section as it finds it, leaving it to the Legislature to amend the section if the reading be not that which the Legislature intended."

The case of *McLeod v. Fortune*, 19 U. C. R. 100, referred to by Dr. McMichael, is also in point against the objection; and we may point out that by 41 Vic. ch. 8, sec. 12, O., the affidavit of *bona fides* required by sections 5 and 6 of, R. S. O. ch. 119, may now be made by one of several bargainees or mortgagees, no distinction being made as to the debts secured being in their origin joint or several.

It is then objected that the plaintiff is estopped from claiming as mortgagee by reason of his having bought in the property at the bailiff's sale. In the view we take of the case it is not necessary to determine this objection, for we think the plaintiff acquired a good title by that purchase. But we have no doubt he may also rely upon the mortgage. There is nothing to prevent a mortgagee from buying, just as any stranger might do, and standing upon his right as purchaser, but if he chooses to buy as a mortgagee merely to protect his interest, or to treat his mortgage as still subsisting, he may do so, the only effect being that the mortgagor's right to redeem still continues:

Smart v. Cottle, 10 Grant 59; *Kelly v. Macklem*, 14 Grant 29.

In the present case the mortgagees would appear to have bought for the purpose of protecting their interests as mortgagees, and they were both assenting parties to the renewal of the mortgage.

It was said that, so far as the mortgage title was concerned, the plaintiff must fail, because he was only claiming part of the goods embraced in the mortgage, and that his interest as mortgagee was a joint one. The defendant has nothing, however, to do with this. The only question is, whether the plaintiff has such an interest in the goods as entitles him to resist the seizure: *Grant v. Wilson*, 17 U. C. R. 144.

The only objection really pressed to the validity of the plaintiff's title as purchaser at the bailiff's sale, was, that as the sale was not accompanied by an immediate delivery, and an actual and continued change of possession, it should have been in writing, and registered pursuant to the 5th section of the Act.

We think there is no force in this objection. The section no doubt says, "every sale," but it is evidently dealing only with the case of a sale by the owner of the goods, for if the requirements of the section are not complied with the sale is declared to be void as against the creditors of the bargainer and subsequent purchasers, or mortgagees in good faith, and as the bargainer is not the owner of the goods, but the landlord or public officer, as the case may be, the purchaser cannot make the affidavit required by the section.

In *Kissock v. Jarvis*, 6 C. P. 393, Draper, C. J., said, at p. 396: "As at present advised, I do not think that a bill of sale of an execution debtor's goods, executed by a sheriff to a purchaser, requires to be filed in the office of the Clerk of the County Court, under our Provincial Statutes, 12 Vic. ch. 74, and 13 & 14 Vic. ch. 62."

The present Act is less favourable in this respect than the former Acts to such a construction as the defendant wishes us to put upon it.

The English Acts, 17 & 18 Vic. ch. 36, sec. 3, and 29 & 30 Vic. ch. 96, sec. 7, and the Bills of Sale Act, 1878, are so framed as to include the case of a sale under process, and provide that unless registered the sale shall be null and void, not, "as against the creditors of the bargainor," but "so far as regards the property or right to the possession of any of the personal chattels comprised in such bill of sale."

It has never been the practice with us, so far as we are aware, to register a bill of sale in the case of a sheriff's sale, or of a landlord's or collector's sale. We think none of them are within the Act, and apart from the Act the purchasers at such sales are protected, though the goods are suffered to remain on the premises of the former owner, on the ground that the purchase is necessarily open and notorious to the neighbourhood, and there is notice to the world. Fraud in such a case is a question of fact for a jury. The publicity of the transaction takes away the presumption of fraud: 2 *Kent's Commentaries*, 11th ed., p. 695, sec. 519; *Kidd v. Rawlinson*, 2 B. & P. 59; *Latimer v. Batson*, 4 B. & C. 652; *Jezeph v. Ingram*, 8 *Taunt.* 838.

CORBY ET AL. V. CLARKE.

OSLER, J.—What has been said in the case of *Severn v. Clarke*, applies generally to this case also. The additional objection, as to the validity of the transfer from Mulkearn to the plaintiff, was not urged, and, no doubt, for the simple reason that it is without foundation.

In our opinion the rule in each case must be discharged.

Rules discharged.

LANGWITH V. DAWSON ET AL.

Conviction made in county—Justices signing in city—Validity of—Evidence—Admissibility of—R. S. O. ch. 5, sec. 3, ch. 72, sec. 6.

By R. S. O. ch. 5, sec. 3, certain cities, including Kingston, form, for judicial purposes, part of the respective counties in which they are situate, and by ch. 72, sec. 6, no other Justice of the Peace shall act in any case for any city having a Police Magistrate.

The conviction, in this case was signed by two Justices of the county of Frontenac. The case was heard in the county, and the conviction stated that it was signed there, but it appeared that one of the Justices signed it in the city.

In replevin for plaintiff's goods sold under a distress warrant issued upon such conviction, *Held*, that the plaintiff could not recover, 1, for the Justices had not acted *for the city* within ch. 72; and 2, the conviction, which could not be questioned in this action, stated it was signed within the county.

Quære, whether the signing of the conviction was a judicial or ministerial act, and therefore whether the place where it was done was material.

Replevin for a horse.

Pleas.

1. Denial of taking.
2. That the horse was the property of the defendants, and not of the plaintiff.

3. That Dawson averred, and Buck acknowledged, the taking, under a warrant of distress against the goods and chattels of the plaintiff, upon a conviction made on the 6th of July by two Justices of the Peace for the County of Frontenac, M. P. Guess and G. Sleeman, for selling spirituous liquors without license. Issue.

The cause was tried before Patterson, J. A., and a jury, at Kingston, at the Fall Assizes of 1879.

The question at the trial was, whether the conviction was valid. The case was heard in the county, and a memorandum of the conviction was made, at the conclusion of the trial, at the foot of the evidence. The conviction was signed by the two Justices for the county who heard the case, and stated on its face that it was signed by both in the county, but, in fact, one of them signed it in the county, and the other one in the city of Kingston, and

it was contended that as one Justice executed it in the city it was void.

The learned Judge, after hearing the counsel on the point, decided as follows :

" I think the conviction is good, even although signed by one of the magistrates in the city ; and, even if a formal conviction were necessary, the memorandum of conviction of the foot of the evidence I take, for the present purposes to have been also signed on the sixth of July, and by one of the magistrates in the city, although these are not to be taken as facts, in case of further proceedings, as admitted by the defendants. I am also of opinion, that with the conviction on file with the Clerk of the Peace, and valid on its face, the plaintiff cannot succeed. I therefore enter a nonsuit, the plaintiff submitting in deference to my ruling. I decline to receive the evidence of some twenty witnesses whom the plaintiff has here, as the facts on which my decision proceeds are not proposed to be affected by that evidence.

In this term, November 28, 1879, *Falconbridge* obtained a rule calling on the defendants to shew cause why the verdict should not be set aside, on the ground that the learned Judge at the trial erroneously held that the convicting county Justices could adjudicate on county cases and make their convictions when within the city limits, and therefore wrongfully withdrew the case from the jury, and entered a nonsuit ; and on the grounds that the first conviction was made by the county Justices in the city of Kingston, then having a Police Magistrate, and without authority for their act ; and that the second was made for the same offence, and ante-dated long after the commencement of this suit, and effect should not have been given to either of the convictions ; and because the same Justices never finally tried or convicted the plaintiff, prior to the commencement of this suit, in any other place than in the city, in which they have no jurisdiction ; and for the improper rejection of evidence tendered by the plaintiff to prove these facts more fully.

In the same term, December 4, 1879, *Mudie* shewed cause. The conviction states it was signed by the two Justices, at the township of Kingston, and the plaintiff cannot dispute that fact: *Brittain v. Kinnaird*, 1 B. & B. 432. By the C. S. U. C. ch. 54, sec. 365, "Justices of the Peace for a county, in which a city lies, shall, as such, have no jurisdiction over offences committed in the city." By the Law Reform Act, 1868, 32 Vic. ch. 6, sec. 10, "The said cities" [including Kingston] "shall thenceforth, for judicial purposes, be respectively united to and form part of the several counties in which they are respectively situate." By the R. S O. ch. 72, sec. 6, "No other Justice of the Peace shall admit to bail, or discharge a prisoner, or adjudicate upon or otherwise act in any case for any town or city where there is a Police Magistrate, except at the Courts of General Sessions of the Peace," &c. This last clause is the only one relating to this question. What is complained of is, that one of the Justices signed the conviction in the city. That, however, was only a ministerial act. The substantial part of it had before been completed by the Justices when they made the memorandum of conviction under the 32 & 33 Vic. ch. 31, sec. 42, D., under their hands, after which they could draw up the conviction in proper form. Such a ministerial act could well be executed in the city of Kingston. He referred to *Graham v. McArthur*, 25 U. C.R. 478; *Duchess of Kingston's Case*, 2 Smith's L. C., 7th ed., 779, *et seq.*

Bethune, Q.C., and *Falconbridge*, contra. The R.S.O.ch.5, sec. 3, does not unite a city to the county in which it is for judicial purposes absolutely, but only "for all purposes not otherwise provided for by law," and it has been provided by law that county Justices shall not act in the city. The 29 & 30 Vic. ch. 51, sec. 360, enacted that Justices of the Peace for a county in which a city lies should, as such, have no jurisdiction over offences committed in the city; but it also provided that "any Justice of the Peace for the county may issue any warrant or try or investigate any

case in a city when the offence has been committed in the county * * in which such city lies, or which such city adjoins." That section was repealed by the Law Reform Act, 1868, 32 Vic. ch. 6, sec. 10, and it has not since been re-enacted. The memorandum of conviction is only required under the 32 & 33 Vic. ch. 31, D., for the purpose of being served on the party, before any warrant is issued against him or his goods: sec. 52. It does not supply the place for any purpose of the conviction. The question then is, whether a conviction signed by two county Justices in a county case, but signed by one of them in the city in which the county is situate, is valid in law. *Hunt v. McArthur*, 24 U. C. R. 254, is expressly against the validity of such a conviction. See also *Regina v. Row*, 14 C. P. 307; *Paley on Convictions*, 5th ed., 18-20, foot notes; *Baker v. Cave*, 1 H. & N. 674; *Cooper v. Wandsworth Board of Works*, 14 C. B. N. S. 180; *Taylor on Evidence*, 7th ed., vol. i., p. 159, sec. 125.

December 27, 1879. WILSON, C. J.—The rule of law is, that jurisdiction must be exercised within the place over which the jurisdiction extends. Some acts are judicial and some ministerial. The former must be done within the territorial limits of the jurisdiction. The latter may be done beyond them.

The provision of the statute law on the subject is that contained in R. S. O. ch. 72, sec. 6: "No other" (*sic*) "Justice of the Peace shall admit to bail, or discharge a prisoner, or adjudicate upon, or otherwise act in any case for any town or city where there is a Police Magistrate, except at the Courts of General Sessions of the Peace;" and in the R. S. O. ch. 5, sec. 3, making cities for judicial purposes not otherwise provided for by law united to and part of the counties in which they are respectively situate.

These enactments mean that the county Justices are, and shall be, Justices over the whole area of the county, including the city, but that they shall not, where there is

a Police Magistrate for the city, do any of the acts above specified.

What are these acts?

1. Not to admit to bail or discharge a prisoner; nor
2. Adjudicate upon; nor
3. Otherwise act, in any case, for any town or city, except at the General Sessions.

In this case the Justices for the county did not admit to bail, nor discharge a prisoner; nor did they adjudicate upon, or otherwise act, "in any case, for any town or city."

It is not necessary to consider the general point which was argued, namely, whether the signing of a conviction is a *judicial* act, which must be done by the two magistrates at the one time, and within the limits of their jurisdiction, because we are not required to do so: firstly, because the Justices here have authority to act in the city of Kingston, subject only to the terms of the sixth section of R. S. O. ch. 72, before stated, and these terms they have not violated, they have not acted *for the city*; and, secondly, because the conviction stands in full force, and it alleges the due execution of the conviction to have been at the township of Kingston, manifestly within the jurisdiction of the county Justices, and its validity cannot be questioned in this form: *Brittain v. Kinnaird*, 1 B. & B. 432; *Basten v. Carew*, 3 B. & C. 649; *Taylor* on Evidence, 7th ed., vol. ii., pp. 1394-6, secs. 1482-1483, and cases there referred to.

The cases on the general question, as to the necessity of judicial acts being done within the proper jurisdiction, are: *Helier v. Hundred of Benhurst*, Cro. Car. 211-212; *Rex v. Forrest*, 3 T. R. 38; *Rex v. Inhabitants of Hamstall Ridware*, 3 T. R. 380; *Regina v. Row*, 14 C. P. 307, and the cases there referred to; and *Hunt v. McArthur*, 24 U. C. R. 254.

As the conviction produced in evidence is conclusive of all facts necessarily stated in it, the place where it is said to have been executed, although untrue in fact, cannot be questioned. If the execution of the conviction be ministerial, and the place where it was done is immaterial, the

conviction is valid in fact and in law; and if it be a judicial act, and the place where it was done be material, the conviction appearing to be entirely regular on its face, concludes the plaintiff in law, however the fact may be.

The discussion, therefore, as to the exclusion of the evidence, has not to be considered.

The rule will therefore be discharged.

GALT and OSLER, J.J., concurred.

Rule discharged.

CONN v. THE MERCHANTS' BANK OF CANADA.

Bank bills—Payment—Subsequent failure of bank—Tender back within reasonable time—Notice of dishonour.

A person receiving bank notes in payment of property, or in exchange for cash, or on deposit to the credit of the payer, has the right in case of failure of the bank, to return the notes, if he does so within a proper time after receipt.

In this case the plaintiff deposited \$1000 of the notes of the Mechanics' Bank which he believed to be good, to his credit with defendants, at Stratford, on the 28th May, about 11 a.m. About 4 p. m., defendants' agent at Stratford became aware that the Mechanics' Bank had stopped payment. On the following day he sent these bills to defendants at Montreal where the Mechanics' Bank had their head quarters, and on the 31st he charged the amount to the plaintiff, having informed him on the evening of the 30th, that he would do so.

Held, that defendants should have tendered back the notes to the plaintiff on the 28th or 29th: that for the want of such tender they had made them their own; and the plaintiff was therefore entitled to recover.

Quære, whether, if the defendants had presented the notes for payment at the bank at Montreal on the 29th or 30th, and had given the plaintiff notice of dishonour on the 30th or 31st, it would have been sufficient, without tendering the notes back.

DECLARATION on the common counts.

Pleas:

1. Never indebted.
2. Payment.

3. That the plaintiff had deposited with defendants, as his bankers, notes of the Mechanics' Bank to the amount of \$1,000, to be carried to his credit by the defendants, and which was carried to his credit: that the Mechanics' Bank thereafter failed, and the defendants offered the said notes back to the plaintiff, who refused to take the same; and thereupon it was agreed that the defendants, in satisfaction and discharge of the claim now sued for, should lend to the plaintiff \$1,953.15 for three months, and hold the said notes of the Mechanics' Bank for the plaintiff, averring performance.

Issue.

The case was tried before Osler, J., without a jury, at the last Fall Assizes, held at Stratford.

The plaintiff was a customer of defendants' bank at Stratford for eight or nine years past. He made a deposit in the bank there, between 11 and 12 o'clock on the 28th of May, of \$1,423, and got credit for it. Of that sum \$1,000 consisted of the notes of the Mechanics' Bank. The plaintiff believed them to be then current and as good as any other bank bills. On the 30th of May the bank charged the plaintiff with the \$1,000 of Mechanics' Bank notes. He drew \$100 on the 28th of May, and \$700 on the 29th of May, from the bank. The effect would be that if the \$1,000 were taken from his credit he would then have overdrawn his account by the sum of \$359.95. Mr. Kingsley, the bank agent there, told the plaintiff on the 30th of May he had been instructed to charge the bills to his account. The plaintiff objected to it. He first heard the Mechanics' Bank had suspended on the following morning. He heard it from the teller.

The plaintiff had got the \$1,000 in Montreal on the 26th of May. He arrived with it in Stratford on the morning of the 28th, and deposited it on the same day there. Mr. Kingsley said about three in the afternoon of the 28th of May he received a telegram from the General Manager of the defendants' bank at Montreal.

"Would advise caution Mechanics' Bank bills." [Word

illegible—it means *a settlement check.*] "On Molson's refused to-day."

Then followed another on same date.

"See telegram re Mechanics' Trouble is not with Molson's : They are only Mechanics' bankers. This to prevent misapprehension."

On the same date another came about four o'clock. "Mechanics' Bank has stopped payment, send in obligations promptly."

Mr. Kingsley, at Stratford, got it about five in the afternoon.

On the 29th of May Mr. Kingsley wrote to Montreal enclosing the plaintiff's deposit of \$1,000 Mechanics' Bank notes to the office at Montreal.

On the 30th he got a telegram from the office at Montreal :

" You should have at once returned the notes to Conn, charging his account with them, taking notes however if he wished on collection for him. Put the matter in this shape at once. Reply."

Kingsley telegraphed to Montreal on the same day. "Notes are now in Montreal, and were to Conn's credit before receiving your message. Has \$600 to his credit, Will put into shape your command at once, and await further instructions."

That evening Mr. Kingsley saw the plaintiff, and told him he had instructions from the head office to charge the account, and he asked the plaintiff to call the next morning, which he did.

On that next morning, the 31st of May, Mr. Kingsley said: "I told him that I had that morning charged the bills to his account according to my instructions : that I held the \$1,000 of Mechanics' bills for collection according to the instructions I had received. Nothing further took place that I recollect of."

It was agreed that the Mechanics' Bank did not open its office at Montreal on the 29th of May.

There was a contention whether the plaintiffs had or

had not agreed to assume these bills again upon getting some accommodation from the bank for doing so. He denied it. Mr. Kingsley asserted it.

The learned Judge found that part of the case was not proved. He also found that the defendants received the bills as money, and placed them to the plaintiff's credit on the 28th of May: that the bank failed on the 29th, and the plaintiff had no notice until the evening of the 30th that the bills would be charged to his account; and on the 31st they were so charged to him without his consent, and against his will; and further, that on the 29th May, after the agent at Stratford knew of the failure, the agent without notice to, and without asking the consent of the plaintiff, sent the bills to Montreal, where they remained up to the time of the trial. The learned Judge thereupon entered a verdict for the plaintiff, and damages for \$1,025.

In this term, November 20, 1879, *J. F. Smith* obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered for the defendants, on the ground that the said bills were delivered to the defendants as a deposit, and not as cash, and the Mechanics' Bank having suspended payment before the bills could have been presented, and the plaintiffs having been notified thereof within a reasonable time, the defendants were entitled to debit the plaintiff's account with the amount of the same

In the same term *Idington*, Q. C., shewed cause. The notes were paid into the bank as cash by the plaintiff, and were received by the defendants as cash: *Nightingale v. City Bank of Montreal*, 26 C. P. 74; *Rogers v. Langford*, 1 Cr. & M. 637, 3 Tyr. 654; *Henderson v. Appleton*, cited in *Chitty on Bills*, 11th ed., 257-9. See also pp. 367-70. The notes, if returnable to the plaintiff by reason of the failure of the bank, or by refusal of the bank to honour them, should have been tendered back to the plaintiff. He referred to *Hansard v. Robinson*, 7 B. & C. 90; *Timmins v. Gibbins*, 18 Q. B. 722; *The Guardians of Lichfield Union v. Greene*, 1 H. & N. 884; *Camidge v. Allenby*,

6 B. & C. 373; *Turner v. Stones*, 7 Jur. 745, 1 D. & L. 122; *Miller v. Race*, 1 Burr. 452; *Gray v. Worden*, 29 U. C. R. 535.

R. Smith, (of Stratford,) contra. A bank receiving notes, as in this case must be able on some terms and under some conditions to return the notes if the bank issuing them has failed, or if such bank declines to pay them. There is a difference, also, whether such notes are received in discharge of an antecedent debt, or as a deposit to be carried to the banking credit of a customer: *Woodland v. Fear*, 7 E. & B. 518; *Owens v. Quebec Bank*, 30 U. C. R. 382; *Timmins v. Gibbins*, 18 Q. B. 722; *Shand v. Grant*, 15 C. B. N. S. 324; *Freeman v. Jeffries*, L. R. 4 Ex. 189; *Gray v. Worden* 29 U. C. R. 535; *McLachlan v. Evans* 1 Y. & J. 380. The defendants were right in sending the notes to Montreal for presentation there if necessary, but they need not be sent if the bank were notoriously insolvent: *Robson v. Oliver*, 10 Q. B. 704. The notes were also rightly sent to Montreal to the head office, that it might be known whether the defendants might not, for the sake of their customers, retain the notes of the insolvent bank against the notes which the insolvent bank might hold against the defendants. If notice of insolvency were given to plaintiff on the day the defendants had knowledge of the same, it was in time: *Berridge v. Fitzgerald*, L. R. 4 Q. B. 639; *Gladwell v. Turner*, L. R. 5 Ex. 59; *Owens v. Quebec Bank*, 30 U. C. R. 382; *Heywood v. Pickering*, L. R. 9 Q. B. 428. The defendants were not bound to tender the notes back: *Timmins v. Gibbins*, 18 Q. B. 722. He also referred to *Clode v. Bayley*, 12 M. & W. 51; *Pott v. Clegg*, 16 M. & W. 321, Amer. ed., and the American cases cited in the notes: *Robarts v. Tucker*, 16 Q. B. 560, 575; *Foley v. Hill*, 2 H. L. Cas. 28, 36; *Prince v. Oriental Bank Corporation*, L. R. 3 App. Ca. 325; *Garnett v. McKewan*, L. R. 8 Ex. 10; *Morse on Banks and Banking*, ed. 1870, pp. 43, 457. A formal presentation by a Notary Public would not have been warranted, as he is entitled to a fee of \$2 upon each separate note, which would have been more than the actual value of the notes.

December 27, 1879. WILSON, C. J.—It may be taken as settled that bank notes are considered and treated for all business purposes, and in the common daily transactions of mankind, as money or cash : *Miller v. Race*, 1 Burr. 452.

The plaintiff made the deposit in question at the bank on the forenoon of the 28th of May, and the amount of it was at once carried to his credit in the books of the bank, where he kept his banking account as one of its regular customers. About three o'clock on that day the agent of the bank at Stratford, where the deposit was made, was directed by the head office of his bank to be cautious about the Mechanics' Bank bills, of which bank the notes deposited, now in question, by the plaintiff consisted.

About an hour after that he received another telegram saying the Mechanics' Bank had stopped payment and to send in the obligations promptly.

Other communications followed between him and the head office, and on the evening of the 30th of May he told the plaintiff his instructions were to charge the plaintiff with the amount of these bills. The plaintiff objected to it, but the bank made the charge against him.

There is no reason to doubt that the plaintiff made the deposit in good faith, having no knowledge of the state of the Mechanics' Bank, and it is not likely he would know it at Stratford when the defendants' agency there knew nothing of it, and when the defendants at the head office in Montreal, where the Mechanics' Bank had also their head office, knew nothing of it, but only suspected it, and did not prohibit their agency from receiving such notes, but directed them only to be cautious in doing so, that is to take them conditionally or at the risk of the payer of them. And that information the agency at Stratford received several hours after the plaintiff had made his deposit.

As these notes pass and are received and treated as cash, what is the rule applicable in such a case ?

In *Camidge v. Allenby*, 6 B. & C. 373, goods were sold in the forenoon of the 10th of December. At three in the

afternoon they were paid for in country bank notes. The bank had stopped payment at eleven that forenoon. Neither party knew of the stoppage. The plaintiff did not circulate the notes, but on the 17th of December he required the defendant to take them back and pay for the goods, which the defendant refused to do.

Bayley, J., expressed himself to the effect, and the other Judges did so also, that payment in bank notes was the same as payment in cash, and the plaintiff could not recover, for he got just what was purported to be given to him, and he took the notes at his peril, when he could have demanded cash instead of taking them.

Littledale, J., saying, at p. 385 : "There is no guarantee implied by law in the party passing a note payable on demand to bearer, that the maker of the note is solvent at the time when it was so passed."

Bayley, J., said it made a difference when the notes are delivered at the same time as the sale or transaction takes place, and when they are delivered in payment of an antecedent debt—which latter statement is not acquiesed in by later authority, but it is of no consequence here.

The next case is *Henderson v. Appleton*, cited in *Chitty on Bills*, 11th ed., 259, in which bank notes were also given for goods, and Bayley, J., said, that he believed the ground of the decision in *Camidge v. Allenby*, 6 B. & C. 373, was, that the notes should be deemed a payment, unless returned in a reasonable time ; and that the plaintiff, by keeping the notes a week after he heard of the stoppage of the bank, without notice to the defendant, had precluded himself from recovering ; but that in the case then before him the plaintiff had offered to return and the defendant had refused to take back the notes, and, therefore, the plaintiff was entitled to recover ; and Hullock, B., concurred.

Rogers v. Langford, 3 Tyr. 654, was the next case, and it raised the like question ; that is, whether bank notes given in exchange for cash could be put back on the payer of them upon the receiver discovering the bank had failed, and upon his tendering them back to the payer in a rea-

sonable time after getting them; and it was decided they could be so returned, and that the receiver of them was not conclusively bound by the mere receipt and acceptance of them.

Turner v. Stones, ¶ Jur. 745, was a decision to the same effect; and so also is *Timmins v. Gibbins*, 18 Q. B722..

In *Byles* on Bills, 13th ed., 160, it is said the rule clearly is so in cases of change of cash for bank notes, and of deposits to the depositor's credit in a bank.

The case of *Guardians of Lichfield Union v. Greene*, 1 H. & N. 884, is opposed to this; but it does not cite any one of the above cases but that of *Camidge v. Allenby*, 6 B. & C. 373.

Presentment of the bank notes to the Mechanics' Bank was not necessary by reason of its insolvency: *Robson v. Oliver*, 10 Q. B. 704. It is also a decision in accordance with the cases before mentioned, except the one in 1 H. & N. 884, and there, also, Patteson, J., at p. 716, says, *Camidge v. Allenby*, 6 B. & C. 373, was decided on the ground of laches.

It is so perfectly reasonable that a person receiving bank notes in payment of property, or in exchange for cash, or in deposit to be credited to the payer, should, whether the bank, whose notes they are, should have failed before such transfer or deposit of them or after it, have the right to return the notes upon the one who gave them, so long as that is done within a proper time after they have been received, that I have no difficulty whatever in accepting it as the rule and law upon the subject. And so far we determine that when the defendants received the notes in question from the plaintiff, they did not receive them absolutely as cash, but conditionally only, that is, with the right of return on the failure of the bank, so that the return be made within a reasonable time.

In this case the deposit was on the 28th of May in the forenoon, and about five o'clock in the afternoon the bank agent at Stratford had notice from the head office of the defendants' bank at Montreal that the Mechanics' Bank

had stopped payment. The notes could have been returned or tendered to the plaintiff upon that day or upon the 29th. No tender of them was in fact ever made to the plaintiff. He knew nothing of the insolvency till the agent at Stratford told him on the evening of the 30th that he, the agent, had been instructed by the head office to charge the notes back again to him. The agent had not then the notes to offer back; he had on the 29th sent them to the head office at Montreal for directions.

For the want of a tender of the notes on the 29th the defendants made the notes their own.

It may be the defendants, if they had presented the notes for payment to the Mechanics' Bank at Montreal on the 29th or 30th of the month, might have given the plaintiff due notice of dishonour on the 30th or 31st of the month, and that might have been sufficient without tendering the notes back: *Timmins v. Gibbins*, 18 Q. B. 722. But no such notice of dishonour was given to the plaintiff. He was told on the 30th the notes were to be charged back to him, but that was not a notice of dishonour.

The case is one of some hardship. The loss happens to fall on the defendants. It would equally have been a hardship if the loss had fallen on the plaintiff, for both parties are equally innocent; but they are not equally culpable. The fault in law is with the defendants, and they must bear the loss.

GALT and OSLER, JJ., concurred.

Rule discharged.

RE KINGSTON ELECTION CASE.

DRENNAN V. GUNN.

GUNN V. MACDONALD.

Election—Application for new petitioner after lapse of six months—Corrupt bargain—Meaning of.

The applicant herein, alleging that there was a corrupt agreement for the withdrawal of the petitions in the above cases, by which the petitions were to be allowed to lapse, each petitioner withdrawing the charges by him respectively preferred, applied to have himself substituted as petitioner in each case, and that the deposits made therein should remain as security for any costs that might be incurred by him; and for the appointment of a day of trial of such petitions.

Held, that under sec. 2 of the Act of 1875, the trial of election petitions must take place within the six months limited by that Act, unless postponed as therein directed; and it appearing that the time so limited had expired prior to the application, it could not therefore be entertained.

Held, also, that, in any event, the deposits would not be directed to remain as such security, for although the said agreement might be deemed in law to constitute a "corrupt bargain," yet that it would not be so under the statute 37 Vic. ch. 10, sec. 5, D., for that thereunder the motives and intent of the parties must be considered, and the evidence, set out below, shewed that no corrupt bargain was intended.

IN Trinity Term, September, 1, 1879, *John Stewart*, in person obtained a rule in each of these cases, calling upon the parties in each case to shew cause on the 17th of September, why he, the applicant, should not be substituted as petitioner for the petitioner in each of the cases, and why the deposit made in each case should not remain "as security" for any costs that may be incurred by him, as directed by the "Controverted Elections Act of 1874," sec. 54, and ch. 10, sec. 2, of the Act of 1875; and why a day should not be fixed for the trial of the said respective petitions.

The motion in Drennan's case was supported by the following affidavits of the applicant. One made on the 7th of August, 1879, stated the applicant to be an elector of the city of Kingston; and that he voted at the election in September, 1878, in which Sir John A. Macdonald, Alexander Gunn, and the applicant were candidates: that a petition was filed in this Court by Drennan against the return of Gunn: that a petition was filed in this Court by

Gunn against the return of Sir John A. Macdonald : that the applicant has reason to believe, and does believe, steps are being taken by the said Drennan and Gunn to withdraw the said petition : that the applicant has reason to believe and does believe that the withdrawal has been induced by a corrupt bargain or consideration : that the applicant desires to be substituted as a petitioner for each of the said petitioners : that the applicant desires the security given on behalf of each of the said petitioners be directed by the Court to remain as security for any costs that may be incurred by him as substituted petitioner, and that, to the extent of the sum named in each of the original securities, the said original petitioner be liable to pay the costs of the applicant as substituted petitioner.

The other affidavit was made on the 20th of August, and, as far as it goes, is in substance similar to the preceding affidavit.

The affidavit in *Gunn v. Macdonald* was made on the 20th of August. It stated as follows :

4. "I have reason to believe, and do believe, that the said Alexander Gunn has bargained with the said Samuel P. Drennan, that in consideration of said Drennan withdrawing his said petition said Gunn would withdraw his said petition against the said Sir John Macdonald, and that he, the said Gunn, would pay all costs that had been incurred in both cases.

5. "The corrupt bargain has been published with expressions of satisfaction in the *Kingston News*, which professes to be conservative, and in the *Kingston Whig*, which professes to be reform, as actually accomplished."

In other respects it was like those in the other case.

The rules were enlarged until this term at the instance of the parties called upon to shew cause.

Dr. Stewart filed a very strong affidavit in denial of those put in by way of answer to his motions.

In this term, November 25, 1879, *Bethune*, Q.C., shewed cause for Gunn in both cases, and for Sir John A. Mac-

donald, the other respondent ; and *Marsh* shewed cause for Drennan. Drennan's petition was filed on the 4th of November, 1878, and Gunn's petition on the 19th of November, 1878. The necessary deductions of time must be made for the next six months during the time the House was in session, in case it should appear the presence of the respondent was necessary at the trial, and while the Terms of the Court continued. That fact does not appear. But assuming it does, and that the applicant is still within the six months in making this motion upon the 17th of September, when the rules were returnable, he still cannot be allowed to intervene, because if made a substituted party he would not have time to give the necessary notice of trial and go to trial within six months from the time the petition was presented after making the above deductions, and the trial must in any event take place within that time, or be duly postponed. If Dr. Stewart is allowed to intervene, it should be on such terms "as shall be just." The depositors should be allowed to withdraw their money. It is said the deposits should be allowed to be used by Dr. Stewart in carrying on their petitions ; but that is only to be done "if the proposed withdrawal is, in the opinion of the Court, induced by any corrupt bargain or consideration :" Act of 1874, ch, 10, sec. 54, which is positively denied by all the affidavits filed in answer. It also appears by affidavit that the present applicant himself filed a petition against Gunn and Macdonald, touching the same election, but he did not make a deposit as required by the Act, and as he has not prosecuted his own petition he should not be allowed to intervene, as he now asks.

Dr. Stewart, in person, contra. There has been a corrupt bargain made between the parties, to prevent each petition being tried. The statute expressly forbids it. It has been done in defiance of the Act. It is acknowledged in the affidavits which the parties themselves have put in, and they pretend to justify it. It is because of such a bargain having been made that the deposits are asked to be placed

in the control of the intervening party, to enable him to carry on the prosecution in the interest of the public. The six months have nothing to do with the case, nor is it necessary to deduct any time for the sitting of Parliament, or of the Court. By 37 Vic. ch. 10, sec. 11, D., the Court may at any time after five days from the filing of the petition, upon the application of either party, fix some convenient time and place for the trial of the petition. By section 13 the Judge may adjourn the trial from time to time; and by section 43 the Judge shall have power on the application of any of the parties to a petition to extend, from time to time, the period limited by this Act for taking any steps or proceedings by such party. These are the authorities under the statute relied upon for the power and duty of the Court to fix the trial at any time without regard to the six months, even in six years after the petition is filed ; and the cases decided by the Court on that point are of no effect against the statute : *Re Glengarry Election Case*, 12 L. J., N. S. 117 ; *Re Addington Election Case*, 39 U. C. R. 131 ; *Re Kingston Election Case*, 39 U. C. R. 139. It is as much the duty of the respondent as of the petitioner to have a day for the trial fixed, for it is to be done at the instance of either of the parties, and it is the duty of the Judge to see that the trial takes place. If he does not, he is alone to blame if the cause be not tried.

December 26, 1879. WILSON, C. J.—In the three cases referred to on the argument it so happened that I gave judgment in each of them.

In the *Glengarry Election Case*, 12 L. J. N. S. 117, it was intimated, but not decided, that the postponement under the Act of 1875 should be made at the trial, and not before it began; but an express decision was purposely avoided.

In the *Addington Election Case*, 39 U. C. R. 131, I was of opinion the trial must take place within the six months after deducting the parliamentary session and the Court sittings, and that a postponement of the trial might be

made before the beginning the trial, so long as it was made before the expiry of the six months. The *Kingston Election Case*, 39 U. C. R. 139, followed that one.

Notwithstanding Dr. Stewart's argument and reference to the Controverted Elections Act of 1874, I still think that sec. 2 of the Act of 1875, declaring that the trial referred to in the Act of 1874 "shall be commenced within six months from the time when such petition has been presented, and shall be proceeded with *de die in diem*, until the trial is over, unless on application supported by affidavit it be shewn that the requirements of justice render it necessary that a postponement of the case should take place," does really and truly mean just what it says, and that a limitation has been placed upon the indefinite period for trials before that Act, for very wise and satisfactory reasons. The method of not reading the latter Act and applying all his faculties to the exposition and elucidation of the earlier Act, is an easy way out of difficulties, and does unquestionably establish Dr. Stewart's contention that an election trial may take place at any time, even in six years after the presentation of the petition, provided the same Parliament still has continuance. But, unfortunately, we cannot take the same license which he does. We think it better and safer to consider all the legislation on any subject which may be before us; and we believe that by so doing we are more likely to arrive at a correct conclusion upon it than if we ignored, evaded, or subverted a material part of that legislation.

Upon the facts stated in the affidavits filed on behalf of the parties who shewed cause to the rule, that the parties made an agreement by which the petitions "shall be allowed to lapse," each petitioner withdrawing the charges by him respectively preferred," was an illegal bargain, unless the expiration of six months during which the trial should have taken place at the time the bargain was made makes a difference in that respect, and I shall assume for the purposes of this case it does not—although I am far from saying that I entertain that opinion. They

were public prosecutions, not private suits, and the parties, after originating them on behalf of the public, have no longer any personal control over their final settlement. In law, whatever the motives or intentions of the parties may have been, such a bargain would be esteemed a corrupt bargain. But that is not all which we would have to consider. The statute does not say that any agreement to compound or withdraw from an election petition, shall for the purpose of retaining the deposit money to enable the petition to be carried on by the substituted party, be deemed to be a corrupt bargain, although *prima facie* it certainly would be so; but that the deposit money may be ordered to remain for the benefit of the substituted party, "if the proposed withdrawal is, *in the opinion of the Court*, induced by any corrupt bargain or consideration." That is, it is left to the Court to enquire into and determine what the motives and intent of the parties were, as a matter of fact in making such an arrangement, and not to deal with the motives and intent as a matter of presumption and inference of law which cannot be rebutted. If the parties have violated the general law they may be made to answer for it, but before their money can be taken from them and delivered over to another to disport with it as he pleases, the fact of a corrupt bargain must be proved, and not inferred from the mere act itself.

In the record of the case, how do the facts appear? According to the case of the parties who shewed cause they are—1. That Sir John Macdonald had subjected Mr. Gunn to a personal examination, and Mr. Gunn had subjected Sir John to the like examination. 2. Neither party got what he wanted. The examination of neither of them helped the other. 3. They were each convinced after that experiment that the prosecution of the petitions would not be a successful or profitable proceeding. 4. The trials were, therefore, not pressed on by either party. 5. The petitions were filed in November, 1878, and in August, 1879, they believed the six months allowed for the trial had gone by. 6. They then proposed to make and did

make a settlement to the effect stated. 7. And Mr. Gunn stipulated that in case any party intervened he should get the \$200 he paid on account of Sir John Macdonald's costs back again.

As before stated, Dr. Stewart has strongly opposed several of these statements, and I have read his affidavit carefully. In a matter of this kind I naturally hesitate to accept the statement of one person against the statements of four persons who are, I have no cause to doubt, of equal credit with him, and therefore it is I am constrained to say that I cannot decide, under these circumstances, asssuming as before that the six months had not gone by at the time of the bargain, that however unsupportable in law the bargain made might be, it is one which, in my opinion, was induced by a corrupt bargain or consideration in point of fact. There may be malice in law but not in fact, and there may be fraud in law, yet not a moral fraud or fraud in fact.

The petitions have not been withdrawn yet in fact (unless the agreement to withdraw them be a withdrawal.) If they have been withdrawn by this agreement or when they are withdrawn, the Court in any report to be made to the Speaker may state special facts from which it may appear the agreement was not in fact, as we think it was not, a corrupt bargain, assuming that the expiry of the time for trial did not validate the arrangement, no other person having intervened in that time, according to the Act of 1874, sec. 55.

In such a case, then, if the applicant were allowed to intervene we could not direct that the money of the original depositors should be placed in his power to enable him to expend it in the prosecution of these petitions, which from the information before us would very likely be unsuccessful, and which we have no reason to believe would answer any good or public purpose.

There may be an offence committed in point of law, yet it may not be advisable to make it the subject of a legal prosecution. Just as Bramwell, L. J., said, in the *The Queen v. Bishop of Oxford*, L. R. 4 Q. B. D. 525, 553.

"No doubt the public are interested in the matter; but their interest must be that in some cases there should be no prosecution."

We think that such an order would not, if made be "on such terms as shall be just." I may say that the applicant might be admitted to prosecute these petitions by substitution, although he had omitted or failed to prosecute his own petition.

We have now to consider whether we can on the facts of the case fix a time of trial for these petitions, which point includes within it the further enquiry, whether, after the length of time which has elapsed from the presentation of the petitions, any order for substituting Dr. Stewart in the place of the original petitioners can be made? One petition was filed on the 4th of November, the other on the 19th of the same month, 1878. Dr. Stewart's application was made upon, and has relation to, the 1st of September, 1879. That period, deducting the time for the session of Parliament and the sittings of this Court, left some few days of the six months which had not expired upon the 17th of September.

But we have no right, from anything which is shewn here to deduct the time of the session of Parliament from the 13th of February to the 15th of May, because it is not shewn to us "that the respondent's presence at the trial is necessary." On the contrary, Mr. Gunn was examined on the 28th of December, 1878, and Sir John Macdonald was examined, and we presume about the same time, and as each party was convinced he had made nothing out of his "opponent's" examination, it is not at all likely that the Court or a Judge would have postponed the trial over the session, on the ground that the presence of either of the respondents at the trial was necessary. In that case the six months limited by the Act of 1875 for this trial, as it was not specially postponed, expired about the 21st of July, reckoning from the 17th of November, and deducting thirteen days for term time; and these rules were not moved until the 1st of September last.

If the original parties did not press forward the trials, there was a remedy which Dr. Stewart and every other elector had to meet that state of things, because the Act provides "that whenever three months have elapsed after such petition has been presented, without the day for the trial being fixed, any elector may, on application, be substituted for the petitioners on such terms as shall be just;" Act of 1875 sec. 2, and if no one chose to intervene during the three months specially allowed to him for the purpose, the applicant, as one of the electors, has—as he considered on the argument every body but himself had—been, and upon his own shewing, very neglectful of the public interests he thinks he has been so rigidly guarding.

I see no ground whatever upon which this application can be granted. We have no alternative but to discharge the rule. We shall give no costs.

GALT, J., concurred.

OSLER, J., took no part in the judgment, having been engaged in the case while at the bar.

Rule discharged.

ELLIOTT v. DOUGLAS.

Deed—Construction—Surplusage—Possession.

In ejectment a deed under which the plaintiff claimed was stated to be an indenture made at Quebec, in Lower Canada, between G. of the one part, and "H. accepting hereof for and on behalf of" T. of the other part. The consideration was declared to have been paid by T., and the grant of the land was to him, as was also the *habendum*. The covenants, including one for further assurance, were also made with T. The deed, however, was signed by G. and H.

Held, that in order to give effect to the deed in every particular, according to the plain intent of the parties, the words, "H. accepting hereof for and on behalf of," must be struck out as surplusage and repugnant to the rest of the deed, and thereby the whole conveyance was made operative as a conveyance to T., the signature of H. to the deed being of no consequence not being necessary in the conveyance.

Held, also, that in any event the plaintiff must recover, for that even if the deed could not be sustained in law as conveying a perfect title to T., it would be deemed to be a license to T. to enter upon the land, and he claiming it as his own had sold to a purchaser from whom a good possessory title was shewn.

EJECTMENT, to recover part of park lot number one, in the west half of township lot number one, in the second concession of the township of Drummond, containing three acres, more or less, and specially described in the writ.

The defendant denied the plaintiff's title, and claimed title also by length of possession.

The cause was tried before Cameron, J., with a jury, at Perth, at the Fall Assizes of 1879.

At the close of the plaintiff's case a nonsuit was moved on the following grounds :

1. That the deed from Wm. Isaac Greig, made at Quebec on the 11th of October, 1821, the patentee of the Crown, under which Alexander Thom claimed the land, conveyed no legal title to him.
2. That there was no sufficient evidence of the proof of Archibald McNee's will, although it was more than thirty years old, because it was not produced from the proper custody ; and
3. That the description in the deed from the executors of Archibald McNee to Cuthbertson is uncertain, and the deed is void in consequence thereof.

The learned Judge refused to nonsuit, but reserved leave to the plaintiff to move.

The evidence on these points was as follows :

The conveyance from the patentee was drawn up in this manner :

"This indenture, made the eleventh day of October, in the year of our Lord one thousand eight hundred and twenty-one, at Quebec, in the Province of Lower Canada, by and between William Isaac Greig, Deputy Assistant Commissary General, of the one part, and William Howe, Esquire, accepting hereof for and on behalf of Alexander Thom, half-pay Staff Surgeon, of the other part. Witnesseth that the said William Isaac Greig, for and in consideration of the sum of fifty pounds of lawful money of the said province, to him in hand paid by the said Alexander Thom, * * doth grant * * unto the said Alexander Thom, his heirs and assigns for ever, all and singular * * To have and to hold the same, with the appurtenances, * * unto the said Alexander Thom, his heirs and assigns, to the sole and proper use and benefit, and behoof of the said Alexander Thom, his heirs and assigns, for ever."

All the covenants, including the one for further assurance, were made with "Alexander Thom, his heirs and assigns."

The deed was signed and sealed,

W. J. GREIG, [L.S.]
WILL. HOWE, [L.S.]

It was duly witnessed. And on the affidavit of one of the subscribing witnesses, made on the 13th of October, 1821, before one of the Judges of the Court of King's Bench at Quebec, it was duly registered in the register office for the county of Carleton on the 20th of October, 1821.

2. As to the will the evidence was :

Charles Rice said : I am Registrar of the Surrogate Court of the county of Lanark.

Q. Is this document—the will put in—in your possession as Registrar ?

A. Yes. I produce it under an order of the Court.

Q. When was it filed ?

A. It was filed January 19th, 1843, before my time.

Q. Do you know whether this will was proved in the Surrogate Court?

A. Yes. There is a probate of it. It is not recorded in the books, as they did not record them at that time.

As to the deed from the executors of McNee to Cuthbertson. The conveyance was of "a part of park lot number one, in the south-west half of lot number one in the second concession of Drummond, containing by admeasurement seven acres, more or less, which are butted and bounded as follows, that is to say: Commencing in front of the said concession, in the limit between the said park lot number one and park lot number one in the north-east half of lot number one in the second concession; thence south fifty-four degrees west, eight chains more or less, to the water's edge; thence north-westerly along the water's edge to the limit between said park lots; thence south thirty-six degrees east twelve chains, to the allowance for road in front of said concession, the place of beginning. Reserving to Alexander Thom, his heirs and assigns, the right to overflow such and any part of the above described tract of land as hath hitherto been overflowed by the mill dams of the said Alexander Thom, or which may be hereafter overflowed by continuing the dams at their present height."

There was a very great deal of evidence given on the question of title by possession.

The jury found a verdict for the plaintiff.

In Michaelmas term, November 20, 1879, *H. J. Scott* obtained a rule, calling on the plaintiff to shew cause why the verdict should not be set aside, and a nonsuit entered, pursuant to leave reserved, on the three grounds before mentioned; or why a new trial should not be granted, the verdict being against law and evidence and the weight of evidence.

In the same term, December 4, 1879, *McCarthy, Q. C.*, shewed cause. As to the deed from the patentee, made in Quebec in 1821, it is contended by the plaintiff that if it

was valid in Quebec, where it was made, it is valid here, where the land lies; and, at all events, it is sufficient here: *Chesterfield, &c., Colliery Co., Limited, v. Hawkins*, 3 H. & C. 677; *Berkeley v. Hardy*, 5 B. & C. 355; *Leake on Contracts*, 2nd ed., 223; *Pigott v. Thompson*, 3 B. & P. 147; *Beckham v. Drake*, 9 M. & W. 79, 95; *Storer v. Gordon*, 3 M. & S. 308; Com. Dig., Covenant A 1. The deed being that Howe was "accepting for and on behalf of Alexander Thom," may be read as a grant to Thom. That expression raised a use in favour of Thom from whom alone the consideration moved. If a notice had been given under the clause relating to vexatious objections by an intruder, such as the defendant is, the objection, if it be one, could not have been allowed to be taken: *Thompson v. Hall*, 31 U. C. R. 367; *Booth v. Girdwood*, 32 U. C. R. 23, 34, 35; R. S. O. ch. 51, secs. 26, 27, 28; and under R. S. O. ch. 50, sec. 270, the Court may consider the case as if notice had been given before the trial. The second objection Mr. Scott, for the defendant, does not desire to maintain.

H. J. Scott, contra. The deed conveying land in this province cannot be supported, if not a valid deed for the passing of land according to our own law. And it is contended that the deed in question cannot be supported as one operative in this country. It has been executed according to the law of Quebec, through the intervention of Mr. Howe, if he be a Notary Public, for the real purchaser, Mr. Thom. There is no evidence of Mr. Howe being more than a mere agent for the intended purchaser: *Foote's Private International Jurisprudence*, 152, 153; *Westlake on Private International Law*, p. 69, *et seq.* There was no proof the deed was executed in Quebec, nor what the law of Quebec was in such a case. The deed is wholly invalid. It is of no effect in favour of Howe, as the land is not granted to him. Nor in favour of Thom, for he is not a party to the deed, in the legal sense of the case. No trust can arise, because no conveyance has been made of the land to any one: *Co. Lit.* 231 *a*; 2 *Inst.* 673; *Smith*

on Real and Personal Property, 5th ed., 683, sec. 1797 : *Burton* on Real Property, 8th ed., 151-152 ; *Berkeley v. Hardy*, 5 B. & C. 355. The plaintiff cannot get over the difficulty by serving a notice on defendant to prove his title, because the defendant is not a mere intruder. He bought the land in 1842, and he has held it ever since ; and no such notice ought to be considered now as having been served. The defendant has had such a possession, and for so great a length of time, that the jury should have found the verdict for the defendant.

December 26, 1879. WILSON, C.J.—The second objection was given up, as to the custody of the will.

The third, as to the uncertain description of the deed from the executors of McNee, was not argued, and we suppose because it was not maintainable.

The application for a new trial we cannot entertain, although the jury did find the defendant's title by possession not proved, when he had a very great deal of evidence to support it, because there was also a good deal of opposing evidence, and he had no other title, for the property never belonged to the lot or land which he had bought.

The quantity of land in dispute is one-tenth of an acre, of no special value to him, and was, until lately, as one of the witnesses described it, a "miserable place," where, if he got off a log, he "would be to the waist in water," and perhaps, although now drier, it is not much better than it was.

The only question we have to consider is the first one, whether a title passed to Alexander Thom by the deed from the patentee of the Crown ?

The rule unquestionably is, that a deed *inter partes* is available only by and against those who are parties to it.

A composition deed made with creditors who signed and sealed the deed, was executed by one of two partners in the partnership name by setting his seal thereto, and it was held he alone could sue upon it: *Metcalfe v. Rycroft*, 6 M. & Sel. 75 ; *Barford v. Stuckey*, 2 B. & B. 333.

In *Lord Southampton v. Brown*, 6 B. & C. 718, the rent in an indenture of demise was reserved to a stranger, therefore he could not sue for it.

In *Storer v. Gordon*, 3 M. & S. 308 it was held that in a charter party between A. and B., a release therein from A. to C. was not binding.

Lord Ellenborough said, at p. 322: "As to the release, the objection is this, that where there is such a deed as is technically called a deed *inter partes*, that is, a deed importing to be between the persons who are named in it as executing the same, and not as some deeds are, general to 'all people,' the immediate operation of the deed is to be confined to those persons who are parties to it: no stranger to it can take under it except by way of remainder, nor can any stranger sue upon any of the covenants it contains. For this position, 2 Inst. 673, and several other authorities to which we have referred, were cited, and the same doctrine occurs in Co. Litt. 231a."

In *Chesterfield, &c., Colliery Co. v. Hawkins*, 3 H. & C. 677, the same rule is laid down, referring to Abbott on Shipping, 10th ed., p. 170, and to *Ex parte Cockburn*, 33 L. J. N. S. Bank. 17, 20.

In *Berkeley v. Hardy*, 5 B. & C. 355, the indenture was between J. S. for and on behalf of B. [the plaintiff] on the one part, and H. [the defendant] of the other part; by which B. agreed to let, and H. agreed to take, all the mesuages, &c.

The reddendum was to B., the plaintiff, and the covenants were by H. with B., and by B. with H., the name of S. never occurring in the deed after the commencement until the conclusion, which was, "In witness whereof, we have hereunto set our hands and seals, the day and year above written.

J. SIMMONDS, [L.S.]
J. HARDY, [L.S.]"

Abbott, C. J., in a very short judgment, said, at p. 359: "We are left, then, to decide upon those strict technical rules of law applicable to deeds under seal, which, I believe,

are peculiar to the law of England. Those rules have been laid down and recognized in so many cases, that I think we are bound to say no action can be maintained by W. F. Berkeley upon the deed in question."

I have had extreme doubt in this case. My mind has been more against the validity of the deed than in favour of it. In the case of *Berkeley v. Hardy*, 5 B. & C. 355, it will be observed, the indenture is in the name of Simmonds *on behalf of* Berkeley, the real owner of the land, and Simmonds, in his own name, signed and sealed it. No demise was ever made therefore by Berkeley, and there was no foundation for the covenant by Hardy, who had got nothing, and so it was held the action of covenant could not be maintained against him.

In this case it was not necessary the grantee, whoever he is, should have executed the deed, because there are no covenants by him, and nothing which the grantor has done, or is to do, is dependent upon the execution of the deed by the other party. The grantor undoubtedly intended to convey to Dr. Thom, and he did in form do so, and for full value paid to him for it.

The question then really is, whether the words, "William Howe accepting for and on behalf of," cannot be considered as idle for repugnancy, and the deed be maintained in favour of the actual party. The rules in such a case being that, if possible, every word of a deed must be made to operate in some shape or other; and the Judges ought to be curious and subtle to invent reasons and means to make acts effectual according to the just intent of the parties; and they have had more consideration for the substance, the passing of the estate according to the intent of the parties, than the shadow, the manner of passing it; and they will rather apply the words to fulfil the intent than destroy the intent by reason of the insufficiency of the words.

I refer to *Broom on Legal Maxims*, 5th ed., under the maxim, *Benignâ facienda &c.*, pp. 565, 645, and the cases there referred to.

In *Spye v. Topham*, 3 East 115, the lease and release were objected to, because the release being between M. Thickston of the first part, J. Topham of the second part, and G. Bass, a person named in trust for the said J. Topham, of the third part; and the consideration being for £700 paid by Topham to Thickston, and for 10s. paid by Bass to Thickston; the release was made to *Topham*, the *cestui que trust*, in place of to Bass, the trustee for Topham. The habendum was to *Bass* rightly enough, and Lord Ellenborough, C.J., asked, "if the words '*unto the said F. Topham*,' &c., in the premises which were repugnant to the habendum and the rest of the deed, might not be rejected as surplusage;" and he said, in giving judgment, at p. 118: "The cases cited are perfectly satisfactory in authorizing us to put a construction on the deed, in support of it, which, from the reason and good sense of the thing, we should probably have done without such authorities."

In Lord Say and Seal's case, 10 Mod. 40, the indenture was in blank, where the names of the three parties to it should have been inserted. It provided, that for and in consideration of the sum of 5s., to him in hand paid, hath given and granted, &c. It did not say *who had granted*.

The Court said: "The intention of the deed is plain, if this deed do not make Lord Say grantor, as to him it would have no effect at all, who yet sealed it. According to the common rules of indenture, the words of the deed are the words of all the parties; but Lord Say is a party, therefore he has granted."

In *Dent v. Clayton*, 10 Jur. N. S. 671, an indenture was drawn making a number of persons parties to it, and among them J. W., a mortgagor and bankrupt, and his wife S., reciting that the husband and wife "had agreed to join * * for the purpose thereafter mentioned." It recited also that the purchaser was to have an estate free from encumbrances. The husband, as one of the parties, joined in conveying the land, and the deed stated that the wife intended to acknowledge the same as her act and deed, but she did not in fact release her dower, although she

executed the deed. The husband had, in fact, no interest to convey, as he was bankrupt. He must have joined in it for conformity with his wife for the purpose of her releasing her dower.

Sir W. P. Wood, V. C., said, at p. 672: "If you do not import the wife's name as joining in the conveyance, you have her executing a most solemn deed and yet doing nothing. I think the authorities warrant me in saying she has conveyed the estate free from encumbrances. * * Here" the name of "the husband is by mistake put for the wife or the wife omitted."

In *Trethewy v. Ellesdon*, 2 Vent. 141, an indenture was made between Nicholas Cossen of the one part, and Nicholas Cossen, the younger, of the other part. It recited that Elizabeth Cossen had surrendered to Nicholas Cossen an indenture of annuity, &c., and then it proceeded, "hath given, granted," &c., "unto the said Elizabeth Cossen, her heirs and assigns," &c., not saying *who had granted*. The Court said "that must be taken, that Nicholas Cossen hath given and granted."

The Court will therefore import who the grantor is, so long as he is a party to the deed, although it is not expressly said that he is the person who does grant. The Court will also import the grant to be made to the person to whom it was the manifest intent of the parties it should be made. And the Court will import that a person who is a party to a deed, and who could have been a party to it only for the purpose of conveying an interest in the land which she had, and which land was to be conveyed free from encumbrances, and who has executed the deed, has in law conveyed that which was not in fact conveyed. That was the release of dower only, and it may perhaps not be extended beyond some such interest; and there also the name of the husband might have been expressed in the conveying part in place of that of the wife.

These cases, it appears to me, do warrant us in giving effect to this deed, in every particular, according to the plain avowed intent of the parties, by striking from the

premises, as surplusage and repugnancy, the words, "William Howe accepting for and on behalf of," in which case the whole conveyance is operative, and the grantor will not be made to sign and seal a solemn instrument in vain, after receiving the value of the land he sold and professed to make a valid transfer of.

I do not think the grantor could have been allowed to deny or dispute the effect and validity of the deed as we now interpret it. The signature of William Howe to the deed is of no consequence, as it was in no way necessary in the conveyance. If this had been the case of a mortgage, in which the mortgagor claimed a re-demise, the execution by the mortgagee would, it may be, have been necessary, for that the party who put his name to the instrument would be material as binding himself as such mortgagee.

This conclusion does not conflict with the case of *Berkeley v. Hardy*, 5 B. & C. 355, in any respect, for the defect there was not only that the plaintiff was not designated as lessor in the premises of the deed, but that he had not signed and sealed it, and he could not sue as lessor on the covenant for rent, for the defendant had never received the demise relied upon, and as that was the only consideration and foundation for his covenant, the covenant could not be enforced.

If the deed could not have been sustained in law we should not, however, have decided the case in favour of the defendant, because, as a fact, Dr. Thom was virtually the owner of the land, for there is a conveyance to him of it, and it was intended by the owner to transfer it to him, and he paid a valuable consideration for it, and he sold it, claiming it as his own, on the 28th of May, 1832, to Josiah Taylor, from whom a regular paper and registered title was proved to the present time.

There would, therefore, on this supposition, not have been a perfect title transferring the estate to Dr. Thom, but a license at any rate by the deed and covenants of the patentee to Dr. Thom to enter upon the land. That was

in 1821. The jury have found the defendant had no title by possession. And the defendant said himself that he bought the land from Josiah Taylor in 1842, the very person to whom Dr. Thom had sold it ten years before; and, although Mr. Taylor did not live on it, he was in possession of it by having it rented to different parties before 1842.

It afterwards appears, however, in his evidence, which is according to his notice of title annexed to the record, that he claims the land in no other way than by length of possession. If Taylor was in possession in 1842, and for some years before that, by leasing it to others, it is not too much to assume he was in possession from the time of his purchase, in 1832; and as the defendant, by the finding of the jury, has not had a legal possession long enough to give him a title, that is, for ten years before the bringing of this action on the 23rd of September, 1879, and as there is a regular series of claimants by actual purchase from Taylor downwards, the possession must be presumed to have been continued by them which Taylor began, and if that period be reckoned from 1832, or even from 1842, there is a possession against the defendant for a much longer period than is required to make a good statutory title against the patentee and the heir-at-law; so that the legal title by possession, which has not been held by the defendant, has been perfected in and to the plaintiff and those from whom he claims.

If the plaintiff had not succeeded on this ground, we should have been obliged to grant a new trial, to enable the plaintiff to serve the necessary notice upon the defendant to prove his title under the statute; as it is very unjust that he, a mere stranger, should take advantage of this defective deed, executed nearly sixty years ago in good faith, and for which a valuable consideration was paid, while the party who made it has never sought to disturb it, and could not do so if he attempted it; and while all the persons who have successively bought the land bought also in good faith and for value, and the

defendant alone has never given a farthing for it. His defence is not a meritorious one, and we are well satisfied to let the verdict remain as the jury gave it.

GALT and OSLER, JJ., concurred.

Rule discharged.

REGINA V. PICHE.

Criminal law—Concealing birth of child—Evidence—Sufficiency of.

On an indictment for concealing the birth of a child, it appeared that the prisoner, who lived alone, had placed the dead body of the child behind a trunk in the room she occupied, between the trunk and the wall. On being charged with having had a child, she denied it, saying she was suffering from cramps, and it was only after the doctor who was called in had informed her that he knew she had been delivered of a child, and on being pressed by one of the women present, that she pointed out where the body was, and the woman went and got it. Until so pointed out the body could not be seen by any one in the room.

Held, that the evidence, more fully set out below, was sufficient to go to a jury, and the County Court Judge, before whom the prisoner was tried by her consent without a jury, having found her guilty, the Court refused to interfere.

THIS was a case reserved by the learned Judge of the County Court of the County of Carlton, for the opinion of this Court.

The prisoner was tried by her own consent before the learned Judge, without a jury, on the charge of concealing the birth of a child, contrary to the 32 & 33 Vic. ch. 20, sec. 61, D., to which charge the prisoner pleaded not guilty.

The facts were, that the prisoner was, at the time of her delivery of a child, living in a house alone, about sixty yards from the house occupied by John Orange, a witness at the trial, and by his family.

About 9:30 p.m., on the 31st of July last, Orange said, from what his wife told him, he went to the prisoner's house. She spoke to him from an up-stairs window. He asked her

what was the matter? She said she was sick, and thought she should die. She said she wanted to see her mother. The witness went for his wife's mother, Mrs. Coghlan, and they both went to the prisoner's house. He lighted a lamp. The prisoner was then sitting down-stairs. She said she was bad with cramps. She did not want a doctor till her mother should come next morning. Mrs. Donnell was sent for and came, and Mrs. Kenna came. On the suggestion of the women present the witness was sent for a doctor, and he brought Dr. Wright. The doctor got there about 11 p.m.

Mrs. *Donnell* said she went to the prisoner's about 10 p.m. The prisoner complained of being cramped. They helped the prisoner up-stairs, and she went to bed. The doctor asked prisoner what was the matter with her. She said she was cramped and sick. He asked her where was her child. She said she had not had any. The witness asked the prisoner where was her child. The prisoner said it was behind the chest. The witness pointed to the place. Mrs. Coghlan went and found the dead body of a child. It was lying between the trunk and the wall on the top of some clothes. It was wrapped in a small shirt. It was not dressed in anyway. The witness did not observe anything about the room before the body was discovered.

Dr. *Wright* said: "I asked her what was the matter. She said she was cramped. I told her she had been delivered of a child. From examining her I was satisfied she had been delivered of a child. The delivery had been quite recent. The after-birth was still retained. I asked her before I made the examination if she had been delivered of a child, she said no. I then examined her. I asked her again, and she denied. I told her I knew she had been delivered of a child. After I told her so I removed the after-birth. * * I found it had been severed by a sharp instrument. The child was discovered from half a minute to a minute after I removed the after-birth. One could not see the body of the child from being in the room till it was moved from behind the chest. This was the

same room the prisoner occupied. The appearance of the child's body corresponded with the appearance of the after-birth. The child had been born alive as shewn by the hydrostatic test. * * Mrs. Donnell told the prisoner the child was there, and must be found.

The prisoner's counsel contended no offence was proved.

The learned Judge convicted the prisoner, and he reserved the case as before stated.

In Michaelmas term, November 25, 1871, the case was argued.

J. G. Scott, Q.C., for the Crown. The cases establish that there was sufficient evidence to go to the jury. The place and mode of concealment must depend on the circumstances of each particular case: *Regina v. Brown*, L. R. 1 C. C. 244; *Regina v. Knights*, 2 F. & F. 46; *Regina v. Clarke*, 4 F. & F. 1040; *Regina v. Sleep*, 9 Cox C. C. 559.

No one appeared for the prisoner.

December 26, 1879. WILSON, C. J.—The latest case on the subject is *Regina v. Brown*, L. R. 1 C. C. 244. There the body of the child had been thrown over a wall four and a half feet high into a field. It must have been thrown there from a public house yard, to which yard the prisoner had no right of access. The body could be seen by one looking over the wall of the yard into the field, but not by any one using the yard in the ordinary way. There was no gate into the field but from a butcher's yard, the butcher using the field as a grass field for grazing. There was no path in the field that would take any one within sight of the body, and no one going into the field in their ordinary occupation would go near the body or see it, nor would they see it unless they went to the part of the wall where the body lay. The body was discovered by chance by a child. There was nothing to conceal the body but its situation.

Bovill, C. J., said at p. 246: "What is a secret disposition must depend on the circumstances of each particular case.

The most complete exposure of the body might be a concealment. As, for instance, if the body were placed in the middle of a moor in the winter, or on the top of a mountain, or in any other secluded place, where the body would not be likely to be found. * * In this case there was abundant evidence to go to the jury that the body had been disposed of secretly. The evidence of a secret disposition consisted in the situation in which the body was placed, and it was a question for the jury to say whether placing the body in such a situation was, in fact, a secret disposition of the body. * * There must, no doubt, be an intent to conceal the body, but here there is no question as to the intent." The conviction was, therefore, affirmed.

In *Regina v. Sleep*, 9 Cox C. C. 559, the woman appeared ill. Her mistress sent for a doctor. He asked the woman if she had not been confined. She said she had. He asked her what she had done with the child. She said it was in a box in her bedroom. He went to the room and found the child in an open box having the cover lifted.

Byles, J., said, at p. 560 : "There must be secret disposition" of the body "for the purpose of concealing the birth

* * and a disposition could only be secret by placing it," the body, "where it was not likely to be found. * * Could they" (the jury) "say that an open box in the prisoner's bedroom was a secret disposition. It was for them to say, but in his opinion it was not." Verdict, not guilty.

In *Regina v. Clarke*, 4 F. & F. 1040, a child was found in a dust bin a day or two after its birth, having been accidentally strangled by the umbilical cord. The mother of the child was a servant in the house where the body was found. It was not shewn who put the body there, or that her mother was a party to the body being so disposed of. Martin, B., was of opinion the dust bin was a place in which the body might be disposed of so as to conceal it. The prisoner was acquitted.

In *Regina v. George*, 11 Cox C. C. 41, the prisoner was delivered of a full-grown child on a Sunday afternoon when

most of the inmates of the house were absent. Her mistress asked her next morning what was the matter. She said she had had a miscarriage. Her mistress asked where it was. Prisoner said it was only a six months' miscarriage, and it was thrown away in the slop pail. The prisoner told the surgeon the same. The slop pail contained no after-birth. Two days after the delivery the prisoner was requested to leave the house. Soon after she left a servant girl, on going into a bedroom near the one which had been occupied by the prisoner, saw an old dress hanging partly out of a large box in which old clothes were kept, a hat and bonnet had also been taken out of the box and thrown on the floor. The lid of the box was not quite closed, but kept up a little by a smaller box, which was placed inside of it on the top of some old clothes. The smaller box, which belonged to the prisoner, was found to contain the dead body of a full-grown child. Neither of the boxes was locked or fastened in any way.

Bovill, C. J., was of opinion "the child was put in the box for the purpose of being discovered, instead of being secretly disposed of. It was known the prisoner had a miscarriage, and that being so, she goes away and leaves the body of the child ; and, assuming she placed it in the box, it appears to have been put there as if purposely to invite some one to look for it, and where some one must of necessity discover it. Neither of the boxes being locked or fastened it amounts to no more covering than for decency's sake. It was put in a room which was much resorted to by persons in the house, and the box arranged in such a manner as to attract attention ; and the smaller box was known to belong to the prisoner. It may, therefore, be naturally expected the discovery would be made." The jury found the body was placed where it was "for the purpose of attracting attention."

In *Regina v. Cook*, 11 Cox C. C. 542, the prisoner was a house servant. She went to bed on the 18th of December, saying she was suffering from toothache. She did not leave her room till the 20th. Her door was not locked. She changed the sheets on her bed, and those removed were

stained On the 20th the prisoner was discharged. She began to pack her box. She had it about half filled when another servant went to it. It was not locked. The prisoner finished the packing. The other servant locked it and gave the prisoner the key. The prisoner with her box was then sent to her mother's. The police, soon after her arrival, went to her mother's and found the box in the parlour. The prisoner was asked to empty it. She removed some of the contents, and in doing so was seen to take out a bundle and throw it into the mouth of a flour sack behind the door. This bundle contained the dead body of a child. For the prisoner it was contended : "In the present case the box was left unlocked, and the housemaid had access to it. And in *Regina v. Jones*, tried in 1869, Smith, J., held that placing the dead body of a child in an unlocked box was not of itself sufficient evidence of concealment. Lush, J., that may be so, but then all the attendant circumstances of the case must be taken into consideration." The jury convicted the prisoner.

In the case before us the body of the child was not in a box, either locked or unlocked, or closed or open. It was "behind a box and between the box and the wall on the top of some clothes. It was wrapped in a small sheet. It was not dressed in any way."

The circumstances which bear against the prisoner are, that she lived in the house where she was delivered "alone, about sixty yards from the house occupied by John Orange," the person who went to her house to find out what the matter with the woman was, and, as I understand the evidence, that was the nearest house to the house of the prisoner : that she placed the body where it was found : that the body "could not be seen by one in the room till it was moved from behind the chest," and that she denied having had a child until Mrs. Donnell said to the prisoner "the child was there, and must be found ;" and then she said the child was "behind the chest."

If the house had been occupied by others who had access to the room as well as the prisoner had, the place of deposit of the child would not, I think, have been a secret disposi-

tion of the body "put between a chest and the wall on the top of some clothes"; but living *alone* as she did in the house, the putting of the body between the chest and the wall, was evidence of a secret disposition of it as against all persons who might casually visit her, who would have no right or business to go prying behind the chest, and who could not see it without specially looking for it.

The most open place, as it is said, might be the most secret place of deposit if removed from the ordinary haunts or visitation of others. So the most public place of deposit might also be the most secret place, if it were not likely to be resorted to, or were not likely to be suspected as a place of concealment for such a purpose.

If an ornamental box, jar, or case, exhibited as an article of show only, in a shop window in one of the most frequented thoroughfares of a city were used for such a purpose, it would probably, although seen by thousands of persons in the course of the day, be a more effectual secreting of whatever was placed within it than if it were hidden in a dust bin or thrown into an unfrequented field.

It appears to me then that the placing of the body between the chest and the wall of the room where the prisoner was delivered, and where it could not be seen by any one in the room who did not go to that spot, and look for some object or with some purpose there, was evidence of a secret disposition of the body of the child, although the child was only wrapped in a shirt and lay on the top of some clothes there, because the woman alone occupied the house, and no others that we know of had access, or right of access, to her room; because, also, she did not want to see a doctor until she saw her mother; and because, also, which cannot be rejected, the woman denied having had a child, and persisted in it until she was told she must tell where it was, and until she did tell the body was not discovered by any of those in the room.

I do not say the evidence in this case is evidence necessarily and conclusively establishing the guilt of the prisoner, I merely say that the evidence given is sufficient to sustain the conviction by the learned Judge.

It is possible a jury, or even another Judge, may have formed a different opinion upon the same facts—in which case I should probably have said I could not pronounce such finding to be necessarily and conclusively an erroneous finding, because there is a view which may have been taken of the facts which might sustain a different finding. It might, for instance, have been presented to the jury that although the prisoner had the house wholly to herself and was delivered of her child while alone, and placed the body between the chest and the wall in the manner represented, she did not intend to exclude others from the house at the time she so put away the body of the child ; and the fact, although she called for no help, that when seen by Mr. Orange, her neighbour, she said she wanted to see her mother, was some evidence that she did not intend at or from the first to conceal the birth of the child, or the place where she had put the body. And it might also have been urged on her behalf that she did not object to those persons who did come to her house when summoned by Mr. Orange being admitted and going up with her, and to her, to the room where the body was, when there would be a great chance that they might discover the child.

It might, however, have been argued against her that her conduct shewed she wanted her mother not to make known to her about the child, but to aid her in concealing it ; and the fact that she did not want to see the doctor, although she so much needed one, until her mother came, might have been relied upon for that purpose. She certainly did do all she could to baffle inquiry or discovery until she was obliged to tell the fact.

I can only repeat that there is, in my opinion, evidence to sustain the conviction. I cannot certainly undertake to say it should be reversed.

GALT and OSLER, J.J., concurred.

Conviction affirmed.

MOON ET AL. V. CLARKE.

Agreement to convey land—Immoral consideration—Lien for improvements.

In ejectment the defendant set up a claim to the land under an agreement, which was based upon the immoral consideration of his marriage with the daughter of the plaintiffs' testator, who, as he was aware, was already married, praying specific performance of the agreement, and for the execution of a conveyance of the land, or for a lien for the improvements made by him on the faith of such agreement.

Held, the agreement could not be enforced, nor could there be any lien for the improvements so made.

THIS was an action of ejectment, to recover possession of the north 50 acres of lot No. 5, in the 7th concession of the township of Hope.

The plaintiffs claimed title as devisees of Richard Cullis Moon.

The defendant claimed title :

1. By possession.
2. As tenant of Richard Cullis Moon, for a term not expired.
3. On equitable grounds : That Moon proposed to the defendant that he should marry his daughter, and in consideration thereof offered to make a lease to him of his homestead farm for five years, at the yearly rental of \$200, which offer the defendant accepted, and married the daughter : that after the marriage Moon proposed another arrangement, in lieu of the first, viz., that the defendant, with his wife, should go to reside on the land in question in the suit, which was then in a state of nature, and clear the same, and should have, hold, use, and occupy it as his own, and that the same should be his absolute property, and in consideration of the premises, that Moon would devise the land to the defendant for his own absolutely : that the defendant accepted, and acted upon this offer, and went upon the land, built a dwelling house upon it, and lived there with his wife, relying upon this agreement : that afterwards the defendant, with his own means and labour, cleared thirty acres of the land, built a barn thereon

at a cost of \$300, planted an orchard, and made many valuable improvements thereon, and in other respects dealt with it as his own property, as Moon intended that he should do: that Moon had notice of, and consented to, and approved of all the improvements made by the defendant: that up to shortly before his death, in February, 1879, Moon encouraged the defendant to believe he would perform his promise to demise the land to him; and that the defendant's wife died shortly before her father. The plaintiffs pretend that Moon, shortly before the death of the defendant's wife, made his will, and devised the land to her for the term of her natural life, and after her death to the plaintiffs, and that they are now entitled to the same. The defendant contends that the devise is a fraud upon him, and that he is entitled to hold the land as his absolute property, and to have Moon's agreement with him performed, and prays a declaration to that effect, and an order that the plaintiffs may execute a conveyance of the land to him.

The defendant was allowed to add at the trial to his equitable defence: that as Moon had encouraged him to make all the improvements, under the circumstances above set forth, the plaintiffs ought to be restrained from prosecuting the action until the defendant was paid for the improvements.

And for a further defence the defendant set up a claim of lien for lasting improvements, made under the belief that the land was his own, under the R. S. O. ch. 95, sec. 4.

The case was tried before Wilson, C.J., without a jury, at Cobourg, at the Fall Assizes of 1879.

At the trial the plaintiffs proved their title as devisees of Richard Cullis Moon, who devised the land to his daughter "Prunella, now living with Fred Clarke," remainder to the plaintiffs in fee.

The defendant was called on his own behalf. From his evidence it appeared that he first became acquainted with Moon in the early part of 1874, and hired with him until after harvest in that year. Moon's daughter Susan resided

with him. She was married to a man named Ainley, who had left her some two years before. Soon after harvest Moon proposed to the defendant to rent the homestead, a place of about one hundred acres, for five years. He told Moon that he had no way of working it unless he was married. To which Moon replied : "Marry Susan, and I will give you this place for \$200 a year." If he let it to a stranger he would want, he said, \$300 a year, but if the defendant married Susan he said he would let him have it for \$200. "I said : 'What would I do if Richard Ainley claimed her ?' He said : "I will stand between you and him, and will guarantee he will never trouble you." The defendant took Susan's opinion upon this proposition. "I told her what he wanted me to do. I asked her if she was willing to get married, and she said she was." They were married accordingly, and a few days afterwards the defendant asked for "some writing on the bargain about the homestead." Moon then wished to impose conditions to which defendant would not assent, and complained that he was going back of his bargain ; whereupon the old man said : "You can go on that fifty acres if you want it, if you won't do that, and do with it as you like, *and have it as your own.*" * * I asked : "What about a house ?" He said : "Go at once and put up a house, and leave the wife at the homestead." I went and put up the house, * * He used to call this place (the fifty acres) hers before we were married. I built the house, and * * we went down there to live. I used my own money ; I had about \$200. Moon did not help me in any way. He never put in a cent. * * That winter I chopped logs and got out timber for a barn, worked at the place, clearing it up. * * Next summer I built a barn 30x50 finished it, and insured it for \$300. Moon did not help me * * put nothing in it. This was three years ago. The same fall I started to move the old schoolhouse which was on the place, moved it over to the barn, and made a stable out of it ; put new sills under ; * * It cost me over \$30 to fix it. * * That winter I built a shed alongside the

barn 20x24. * * The first summer I was there I put out fifty apple trees, paid 25c. each for them; put out thirty since, for which I paid 40c. each, for two or three \$1. * * I dug a well. There is thirty or thirty-five rods of board fencing. I built a piece of stump fence with all the stumps I pulled out. I pulled nearly two hundred; cleared about twenty or twenty-five acres. * * I think the improvements I have made are worth \$500 or \$600. I think the place was valued at \$500 when I first went there, and I paid \$2 or \$3 taxes. It is worth \$1,300 or \$1,400 now. Now I pay \$6 taxes. * * I made these improvements because I thought we should have it as our own. He told me lots of times I should have it. I asked him for a deed of it. He said he would not give a deed to any one till he died. He said that we should have it, or that I should have it, I am not sure which, when he died. * * I never would have made these improvements if he had never told me we were to have it. * * I thought I should get it for the term of my life at least. He said he would give it to me and to her. * * He never objected to my making these buildings or improvements. When he was at our place he would always say, why did not I do this, or why did not I do that?"

In cross-examination, he said: "That land," (the fifty acres,) "was always talked of as hers," (the wife's). "The bargain at the time of the marriage was about running the homestead. * * He often said that it was to be mine—that it was to be ours. I thought he was giving it to me for the term of my life, but he never said that. After her death he wanted me to leave. I was willing to do so if he would give me \$200. * * The old man asked me if I was going to insure the barn. I said, after a while. * * The agent went off to the old man to insure it, and he paid the premium."

John Lewis Huffman stated that he had known Moon for upwards of thirty-five years, and the defendant for five years and a half. He corroborated the defendant as to the improvements which he had made on the farm. He spoke of a conversation which he had with Moon on one occasion.

He said: "I built the barn for Clarke. I was going along one day and met Moon. I said, I hear Fred. has been married. 'Yes,' says he, 'I have got a man now who will take care of her, and work for her.' I had mentioned Susan to him. Well, I said, what will Fred. do if Ainley comes back? He said there is no danger of that. He is married in the States; he will never come back here. * * He said, you had better see Fred.; he is going to put up a barn. He used to put many jobs in my way. I said, what means has he for building a barn? Says he, 'I have given him that place down there.' He was then referring to this fifty acres. I said, has he got the deed of it? He said no, but I intend to give him one, and I think my word is good. I took it to be good. I had a good deal of confidence in him." The witness then spoke of the arrangements he made with the defendant for building the barn, removing the old schoolhouse, &c., the value of the improvements, &c.

Other evidence was given as to the improvements and their value.

In reply, some evidence was given for the plaintiffs to shew that they were not worth what the defendant claimed for them, and that he had been partly repaid by the occupation of the land, and the timber which he had sold off it.

The learned Chief Justice valued the improvements at \$450; the timber \$100, and the occupation rent \$150, (five years at \$30,) making \$250; leaving \$200 as the sum which the defendant was entitled to, and he entered a verdict for the plaintiff, and found that the defendant was entitled to, and should have a lien upon the land for, the sum of \$200, the value of his improvements.

In Michaelmas term, November 20, 1879, *Hector Cameron*, Q.C., obtained a rule *nisi*, calling upon the defendant to shew cause why the assessment of the value of the improvements made by the defendant on the land in question, and his lien therefor, should not be set aside, on the ground that a plea claiming such improvements should not have been added, or, if added, should have been added

only in terms of payment of costs up to that time, and the withdrawal of the defence on the record; and that no case was made in the evidence for such an assessment under the statute, as the improvements were not made under the belief that the land was the defendant's own, and that such right to compensation was at most only a personal one against the personal estate or representative of the testator, who would be a necessary party to such an assessment; and that no agreement by the testator corroborated by sufficient evidence was produced at the trial; or why the amount so assessed should not be set aside or reduced, on the ground that the plaintiffs were surprised at the reception of such evidence of value and improvements, and on affidavits filed shewing additional evidence on that subject; and also on the ground, that as the only agreement shewn was one made with the defendant and his pretended wife, who, or whose representative, would have been entitled to a joint occupancy with the defendant, and to one-half of the compensation; and also on the ground that the entry of the defendant on the land having been under an agreement, void against good morals and public policy, no right to compensation of any kind could arise under it.

In the same term *Bethune*, Q.C., obtained a rule *nisi* to enter a verdict for the defendant, on the ground: 1. That the defendant was entitled in equity to the land in question, in consequence of the bargain between Moon and himself, and by reason of Moon's conduct, and the improvements made by the defendant. 2. That the amount of the lien given for improvements ought to be increased to the amount of the cost of the improvements. 3. And in the event of the verdict not being entered for the defendant, that the land should be sold to realize the amount of the lien, in the event of non-payment by the plaintiffs.

In the same term, December 5, 1879, both rules were argued together.

Bethune, Q. C., shewed cause to the plaintiffs' rule, and supported the defendant's rule. What took place here amounted to an agreement by the father to convey the

land. Apart from the immoral taint there was sufficient to constitute such an agreement. At all events there was clearly a valid contract raised under the second agreement, which was not tainted with the immoral consideration, as the parties were then living together as husband and wife: *Ramsden v. Dyson*, L. R 1 H. L. 129; *Fitzgerald v. Fitzgerald*, 20 Grant 410; *McDonald v. McKinnon*, 26 Grant 12; *Hall v. Palmer*, 3 Hare 532; *Turner v. Vaughan*, 2 Wils. 339; *Nye v. Moseley*, 6 B. & C. 133; *Collins v. Blantern*, 1 Sm. L. C., 8th ed., 387. Even if the contract cannot be enforced, the defendant having made the improvements in good faith will not be disturbed in his possession without payment for his improvements, and therefore, apart from the statute, he is entitled to a lien for the full value of the improvements: *Unity Joint Stock Mutual Banking Association, v. King*, 25 Beav. 72; *Gummerson v. Banting*, 18 Grant 516; *Bright v. Boyd*, 2 Story 605; *Biehn v. Biehn*, 18 Grant 497. Under the Statute, R. S. O. ch. 95, sec. 4, the defendant is clearly entitled to such lien: *Smith v. Gibson*, 25 C. P. 248; *Carrick v. Smith*, 34 U. C. R. 389; *O'Connor v. Dunn*, 37 U. C. R. 430; *Romanes v. Herns*, 22 Grant 469; *Acheson v. McMurray*, 41 U. C. R. 484. As the plaintiffs are repudiating the agreement under which the improvements were made, and this Court has equitable jurisdiction to grant relief, the course pursued in equity should be followed, and relief granted on the same terms as is adopted in a bill filed in equity to enforce a lien, namely, the value of the improvements to be paid within six months, or in default the land to be sold and the improvements paid thereout. There should not be a new trial for surprise, for the evidence shews that the plaintiffs had notice; at all events, they should not have gone on with the case, and run their risk of it being decided against them, but should have asked for postponement; but if a new trial be granted, it should be on the whole case.

Hector Cameron, Q. C., contra. There is no such definite agreement here as can be the subject of specific perform-

ance. The agreement relied upon was clearly invalid as being tainted with the immoral consideration, and this applies to the second as well as to the first agreement. Neither apart from the statute nor under the statute is there a lien. There was no mistake as to title, for the defendant knew exactly the nature of his title. Under the statute there can only be a lien where the improvements are made under a *bona fide* belief that the person making them is the owner of the land. The statute was intended to apply to an erroneous belief of title : R. S. O. ch. 95, sec. 4, p. 941. There could not be a belief that the land was his own, for it was only to become his on his doing something to it, namely, making these very improvements.

December 26, 1879. OSLER, J.—The case put forward by the defendant, and made out upon the evidence, is, that the second agreement was made in lieu of, and in substitution for, the first. The consideration for both was the marriage of the defendant with Moon's daughter. If this consideration had, under the circumstances, been free from any taint of immorality, I should have been prepared to hold that enough had been proved to shew that defendant was entitled to a conveyance of the land in question for at least the term of his own life. But it is manifest that the defendant knew from the first that he was marrying a woman who was then the wife of another man. He could not therefore have compelled Moon specifically to perform either the first agreement or the second, which, as he has shewn, was substituted for it. If, then, as I think, he could not have obtained from a Court of equity specific performance of the agreement because of the vice affecting the consideration, I fail to see how he can, as a measure of alternative relief, obtain compensation for his improvements. The plaintiffs rely upon their legal title. The defendant, to shew his right to the land, is obliged to rely upon the agreement. If the agreement had been made in good faith, in ignorance on the defendant's part that

Moon's daughter was then a married woman, neither Moon nor the plaintiffs, his devisees, could deprive him of the land without compensating him for his improvements, if indeed he might not have been held to be absolutely entitled to it: *Fitzgerald v. Fitzgerald*, 20 Grant 410; *McDonald v. McKinnon*, 26 Grant 12; *Biehn v. Biehn*, 18 Grant 497. But in seeking the equitable interference of the Court in his behalf in this action, he stands in the position of a plaintiff in a Court of equity, and he must appear in the character of a *bonâ fide* purchaser, in ignorance of the defect in his title; *Brunskill v. Clarke*, 9 Grant 430; *Sugden on V. & P.*, 14th ed., 747.

The present case is not that put by the Lord Chancellor in *Ramsden v. Dyson*, L. R. 1 H. L. 129, 140: "If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active, and state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented."

Here it cannot be said that there was any mistake on the part of the defendant. He knew his position exactly, and the nature of his title. The fact that everything is referable to the special agreement under which he took possession, and on the faith of which he made the improvements, prevents the application either of the statute R. S. O. ch. 95, sec. 4, as to improvements under mistake of title, or of such cases as *Gummerson v. Banting*, 18 Grant 516, and *Unity Joint Stock Mutual Banking Association v. King*, 25 Beav. 72.

In short, the defendant is entitled to specific performance or nothing.

If I had found that the defendant was entitled to compensation for improvements, I should have been disposed,

in view of the affidavits now filed as to the character of the improvements, and the value of the timber said to have been taken by the defendant, to have directed the same enquiries as were directed in *Gummerson v. Banting*, 18 Grant 576, for the question of the value of the improvements was not what the parties went to trial upon. But in the view I take of the case, I think the plaintiffs' rule should be made absolute to strike out the assessment of damages, and that the defendant's rule should be discharged.

WILSON, C.J., and GALT, J., concurred.

Rules accordingly.

MCQUEEN v. MCINTYRE.

*Promissory note—Alteration of place of payment—Validity—C. S. U. C.
ch. 42.*

In an action on a promissory note it appeared that the note when made and signed by the defendant was dated at Watford and payable to the plaintiff's order "at the Thomas Fawcitt's Bank, Watford," and without the defendant's knowledge or consent was altered by dating it at Alvinston, and making it payable "at my" defendant's "place of business, Alvinston": *Held*, such a material alteration as avoided the note.

THIS was an action on a promissory note for \$378, made by the defendant jointly with one Cahill.

There was also a count on the same note, alleging it to be a guarantee for the payment by Cahill of certain goods which were sold to him by the plaintiff.

There were a number of pleas, but it is only necessary to consider the third, which was: For a third plea to the first count the defendant says, that after the said note was made, and after it was issued, it was made void by being materially altered without the consent of the defendant,

that is to say, by erasing the words: "The Thomas Fawcitt's Bank, Watford," being the place at which the said note was made payable, and inserting the words, "My place of business, Alvinston," as the place at which the said note was to be made payable.

The cause was tried before McMahon, County Judge, at Simcoe, without a jury, at the Fall Assizes of 1878.

The note as originally drawn, and when it was signed by the defendant, read as follows:

\$378. "WATFORD, April 21, 1875.

On the first day of January, 1876, I promise to pay to the order of John McQueen, at the Thomas Fawcitt's Bank, Watford, the sum of Three hundred and seventy-eight dollars. Value received.

"F. A. CAHILL.

"COLIN MCINTYRE."

As altered it was:

"\$378. Alvinston, April 21, 1875."

"On the first day of January, 1876, I promise to pay to the order of John McQueen, at my place of business, Alvinston, the sum of three hundred and seventy-eight dollars,"

Signed as above.

The learned Judge entered a verdict for defendant, considering the alteration in the place of payment to be material, the same having been made after the note was signed by defendant, and without his knowledge or consent.

In this term, August 30, 1879, *T. H. Spencer* obtained a rule *nisi* to set aside the verdict for the defendant, and to enter a verdict for the plaintiff.

In this term, November 24, 1879, *Macbeth* (of London) shewed cause. The plaintiff contends that the alteration was immaterial, and his contention is based on the Consol. Stat. U. C. ch. 42, sec. 1, which provides that a promise to pay at any particular place, without the restrictive words "not otherwise or elsewhere," is a general promise. The

English statute is confined to bills of exchange; but our statute extends to promissory notes, and therefore the maker of a promissory note in this country is in the same position as the acceptor of a bill of exchange in England; and the English cases on a bill of exchange are therefore applicable to a note here; and these cases clearly shew that, notwithstanding the statute, such an alteration in the case of a bill is a material alteration, and discharges the acceptor: *Tidmarsh v. Grover*, 1 M. & S. 734; *Burchfield v. Moore*, 3 E. & B. 683; *Cowie v. Halsall*, 4 B. & Al. 197; *Daniel* on Negotiable Instruments, 2nd ed., vol. ii, pp. 353-5, secs. 1378-9. The defendant's liability is that of surety, and it is clear that an alteration in a contract of suretyship discharges the surety: *Polak v. Everett*, 1 Q. B. D. 669. As to the alteration being made before delivery, it was made after the defendant became a party to it, and after it was a complete instrument: *Halcrow v. Kelly*, 28 C. P. 551. As to the alteration being made by the co-maker with the defendant's authority, the evidence failed to establish this.

T. H. Spencer, contra. The alteration is not material. Under the statute the omission of the words "not otherwise or elsewhere," made the promise a general promise, and there could only be a discharge from liability by payment to the holder personally: *Byles* on Bills, 13th ed., 222. The alteration was made before the note was delivered, and before it became a perfect instrument: *Xenos v. Wickham*, 13 C. B. N. S. 381. The alteration also was made under such circumstances as to affect the defendant with notice: *Downes v. Richardson*, 5 B. & Al. 674; *Westloh v. Brown*, 43 U. C. R. 402. The alteration did not affect the defendant's rights as surety: *Petty v. Cooke*, L. R. 6 Q. B. 790; *Andrews v. Lawrence*, 19 C. B. N. S. 768.

December 26, 1879. GALT, J.—There was no dispute as to the facts of the case, and the only question was, whether as a matter of law the alteration above set out had the effect of discharging the defendant.

It is plain that the note as drawn, and as afterwards altered, are very different. Originally the place where the note was stated to be drawn was "Watford," it was changed to "Alvinston." This would not in my opinion be of much consequence, were it not for the subsequent and material alteration whereby the note is made payable, "at my place of business, Alvinston."

The whole question as to the effect of an alteration in the place of payment, is briefly stated in section 1378 of *Daniel* on Negotiable Instruments, 2nd ed., vol. ii., as follows: "In the third place, as to the place of payment, when the bill or note has been drawn payable at a particular place, the obliteration of such place so as to make it payable generally constitutes a material alteration as to all parties not consenting; and likewise where no place is designated, it is a material alteration to insert one. And *a fortiori* it is a material alteration to obliterate one place and insert another. * * Even a *bona fide* holder cannot recover upon an acceptance so altered, nor upon a note so altered against parties prior to the one making the alteration. Changing the place of date would change the rights of the parties, and hence is an alteration."

It was urged by Mr. Spencer in his argument on this note, that as there were no restrictive words, "not otherwise or elsewhere," the effect of our statute was to make the note payable generally; and so that in fact there was no material alteration.

In *Burchfield v. Moore*, 3 E. & B. 683, one of the cases cited by Mr. Macbeth, the holder of a bill, without the acceptor's consent, altered it by inserting "payable at the Bull Inn, Aldgate."

Lord Campbell, C. J., said, "By virtue of Stat 1 & 2 Geo. IV., ch. 78, these words, if in the handwriting of the defendant, would still leave the acceptance a general acceptance. Nevertheless three very eminent Judges," (mentioning them,) "have successively held that such words, although they do not alter the direct liability of the acceptor, do vary the contract between others who are

parties to the bill; therefore, that, if interpolated without his consent, they may prejudice the acceptor; that they amount to a material alteration of the bill; and that they discharge the acceptor. These decisions were only at *Nisi prius*; but they have been long acquiesced in; and we do not disapprove of them. The plaintiff here is a *bonâ fide* holder, for value, without notice of the alteration; but the bill must be considered as vitiated in the hands of a prior holder."

The statute 1 & 2 Geo. IV, ch. 78, is confined to bills of exchange, but our statute extends to promissory notes.

I am therefore of opinion that the learned Judge's verdict is right, and the rule should be discharged.

WILSON, C. J., and OSLER, J., concurred.

Rule discharged.

YOUNG ET AL. V. HOBSON ET AL.

Statute of Limitations—Ejectment as a bar—Leave in term to supply evidence.

In ejectment by plaintiffs claiming a possessory title as heirs-at-law of one W., it appeared that in 1873, before the statutory period had elapsed, the owner had brought ejectment against W., and that, on proof of an agreement by W., in 1861, to give up possession on demand, and under pressure thereof, a compromise was effected after the record had been entered for trial in 1876, by the owner paying a small sum of money and W. giving up possession, a written memorandum of such compromise being drawn up at the time.

Held, that the plaintiffs could not recover: that the commencement of the action of ejectment prevented the operation of the statute; and that it was immaterial therefore that the plaintiff in it had not entered until 1876, after the ten years required to give a title had expired; and had not entered judgment or taken possession under a *hab. fac. poss.*

On the argument herein in term, the Court, on the application of the plaintiffs' counsel, under R. S. O. ch. 49, sec. 8 a (41 Vic. ch. 8. sec. 7), granted leave to the plaintiff to supply evidence of a search for the memorandum of the compromise, and also to put in the original writ of ejectment in the former action, and the affidavit of service thereof, a copy of such writ only having been filed at the trial; but as without this the plaintiffs would have failed, the plaintiffs were allowed the costs in term.

EJECTMENT, to recover possession of a small parcel of land in the town of Galt.

The plaintiffs claimed title by length of possession as heirs-at-law of their father, William Young, deceased.

They also claimed by a similar title under the possession of their mother, Margaret Young, deceased.

The defendant Hobson claimed title as tenant of Walter Augustus Dickson and John G. Dickson, who were admitted to defend as landlords claiming title as executors and trustees of William Dickson, deceased, the grantee of the Hon. Walter H. Dickson.

The cause was tried before Burton, J. A., without a jury, at Berlin, at the Spring Assizes of 1879.

At the trial it appeared that the Hon. Walter H. Dickson had permitted the plaintiffs' mother, Margaret Young, to enter upon the land in question upwards of thirty years ago, and to build a small cottage upon it during the temporary absence of her husband. After his return they lived together upon the place until the 5th of December, 1861

when William Young gave an acknowledgment under seal of Mr. Dickson's title, and agreed to give up possession whenever it should be demanded. He and his wife continued to reside on the premises without interruption until the year 1873.

On the 9th of March in that year William Dickson, who had in the meantime purchased the property, brought an action of ejectment against Young, to recover possession. Young defended the action. His wife was made a party to the suit. Each of them claimed title by length of possession. Margaret Young died on the 16th of September, 1876, and a few days afterwards the record was entered for trial at the Fall Assizes, in 1876, in the county of Waterloo.

On the production of the agreement of the 5th of December, 1861, of the existence of which the defendant's solicitor up to that time appeared to have been ignorant, he, with the authority of William Young, compromised the action for the sum of \$75, and it was agreed that Young should give up possession. A written memorandum of the terms of the compromise was signed by counsel.

Mr. Allenby, the attorney, said that "the effect of it was that I withdrew the defence in the suit." The money was paid to Mr. Allenby, and Young left the premises, and shortly afterwards went to Detroit, where he died in September, 1877. The key was given to one Blyth, to be handed to Mr. Allenby, the defendant's solicitor, who some time after the money had been paid told him to give it to Mr. Dickson. Dickson having obtained the key from Blyth, in October, 1876, entered upon the property and went over and examined it, leaving it in charge of his agent, one Blain, and the key was left with Blyth, who was in Blain's employment, until May, 1878, when it was given up to Hobson, who went in under a lease from the other defendants.

The plaintiffs in the present action, children and heirs of William and Margaret Young, contended the mere bringing the former action of ejectment did not prevent the statute from running: that it should have been followed up by a

recovery of judgment, and that they, under 38 Vic., ch. 16, acquired a title by possession, as Dickson had not entered until after the 1st of July, 1876.

The memorandum of the compromise was not produced, and the plaintiffs objected that there was no sufficient evidence of a search for it to let in secondary evidence.

The learned Judge held that possession had been obtained by Dickson under pressure of the writ of ejectment, and that the effect was the same as if a judgment had been entered and possession taken under a writ of *hab. fac. poss.*, and he entered a verdict for the defendants.

In Easter term, May 22, 1879, *Osler*, Q.C., obtained a rule *nisi* calling upon the defendants to shew cause why the verdict should not be set aside and a verdict entered for the plaintiffs, on the grounds:

1. That the evidence shewed that Margaret Young, through whom they claimed, had a statutory title to the land in question.
2. That the evidence shewed that William Young, through whom the plaintiffs claim, had a statutory title to the land in question.
3. That there was no evidence of the proceedings in ejectment and the settlement between the attorneys upon which the Court could act, or say that the statute had ceased to run.

In Trinity term, August 28, 1879, *J. K. Kerr*, Q. C., shewed cause. The possession taken under the former action of ejectment, and the settlement made thereon, was sufficient without the action being terminated by judgment, and the issue of a writ of *hab. fac. poss.* and possession taken thereunder: *Thompson v. Hall*, 31 U. C. R. 367; *Doe dem. Strode v. Seaton*, 2 C. M. & R. 728, 1 Tyr. & G. 19; *Outram v. Morewood*, 3 East 346, 354; *Buller's N. P.*, 7th ed., 232b; *Pearse v. Coaker*, L. R. 4 Ex. 92; *Doe dem. Perry v. Henderson*, 3 U. C. R. 486; *Foster v. Foster*, 10 U. C. R. 607; *Harris v. Mulkern*, L. R. 1 Ex. D. 31; *Doe dem. Mee v. Lithuland*, 4 A. & E. 784; *Wilkinson v.*

Kirby, 15 C. B. 430; *Goode v. Job*, 1 E. & E. 6. If the Court should consider the evidence defective as to the settlement and the former writ of ejectment, leave is asked to supply evidence of a search for the memorandum of the settlement, and to put in the original writ of ejectment and the affidavit of service thereof under R. S. O. ch. 49, sec. 8a, 41 Vic. ch. 8, sec. 7, O.

Osler, Q. C., contra. The plaintiffs do not insist upon any claim of title through Margaret Young, but rely merely on the title acquired by William Young. In order to create a bar to the Statute of Limitations, the writ of ejectment should have been followed up by judgment, and the issues of a *hab. fac. poss.* The settlement does not interfere with the plaintiffs' statutory right. The Limitation Act, R. S. O. ch. 108, secs. 4, 5, sub-sec. 1, shews that there must be a dispossession or discontinuance of possession. A mere entry is not sufficient. It has been held that the service of the declaration of ejectment, which had the same effect as the writ now has, constituted a mere entry: *Thorp v. Facy*, 12 Jur. N. S. 741. By the Ejectment Act, R. S. O. ch. 51, sec. 52, a formal and distinct mode is pointed out to enable the defendant to an action of ejectment to confess the action and to abandon possession, and the plaintiffs are endeavouring to take advantage of what amounts to an informal cognovit. This agreement for settlement cannot be treated as a confession under sec. 52. The direct operation of the statute at law cannot be prevented by the private agreement of the parties. It clearly appears, therefore, that the obtaining of possession is deemed a matter of some solemnity, and must be taken in the formal manner provided under the Act. If possession was taken under the settlement, then it was not under the ejectment proceedings, and at the time possession was so taken, the statutory title had been acquired. When possession is taken without a writ of *hab. fac. poss.*, the plaintiff enters by virtue of his title and not under the ejectment proceedings. There is no case shewing that an agreement of this kind will pass the title or relate back to

the writ. However, even if the agreement is valid, it cannot be enforced on these pleadings. He referred to the following cases: *Badger v. Flod*, 12 Mod. 398; *Withers v. Harris*, 2 Lord Raym. 806; *Cole* on Ejectment, 344-5; *Doe dem. Perry v. Henderson*, 3 U. C. R. 486; *Pearse v. Coaker*, L. R. 4 Ex. 92; *Brown* on Limitations as to Real Property, 541-2; *Locke v. Matthews*, 13 C. B. N. S. 753; *Doe dem. Stephens v. Lord*, 7 A. & E. 610.

December 26, 1879. OSLER, J.—At the conclusion of the argument counsel for the defendants asked leave to supply evidence of a search for the memorandum of the withdrawal of the defence in the former action, and to put in the original writ of summons and affidavit of service in that action, a copy only of the writ having been filed at the trial. We allowed this to be done, pursuant to R. S. O. ch. 49, sec. 8 a; 41 Vic. ch. 8, sec. 7, O. Several affidavits were accordingly filed, from which it satisfactorily appears to us that a sufficient search had been made for the missing document to let in secondary evidence of it.

We shall therefore dispose of the case upon its merits.

The plaintiffs' case rests entirely upon the title of William Young. Their counsel very properly abandoned upon the argument any attempt to maintain Mrs. Young's title. It is quite clear upon the evidence that her possession was merely that of her husband.

As to his possession, it is equally clear that on the 9th March, 1875, when the former action of ejectment was commenced, he had not acquired a statutory title. If that action is not to be considered, the plaintiffs would be entitled to recover, because the defendants' predecessor did not enter before October, 1876.

In our opinion, however, the commencement of that suit prevented the operation of the statute.

Turley v. Williamson, 15 C. P. 538, is in point. In that case it appeared that the defendant had obtained possession of the land in question under an ejectment suit commenced in 1852, under the Ejectment Act, then recently passed, but

the *hab. fac. poss.* under which possession had been delivered was not issued until 1863. The plaintiff contended that the possession not having been delivered within twenty years from the time the title had accrued the statute ran and made his title good. The Court held that the bringing of the action, and not the recovery of possession, stayed the operation of the statute.

In the present case the former action was pending at the time the plaintiff therein entered, in October, 1876. The effect of that action, as we have pointed out, was to prevent the operation of the statute, and therefore the entry was made before the plaintiffs' ancestor had acquired a title.

It was urged that as possession was not taken under a judgment in the action the plaintiff must be taken to have entered merely upon his title, whatever it might then be, without reference to the action. But if the operation of the statute was stayed during the pendency of the action we do not see how the title of the defendant in that action could in the meantime have been ripening, as he has never objected to the possession being so taken, nor brought the action to a termination in his favour.

The case of *Doe dem. Stephens v. Lord*, 7 A. & E. 610, was referred to as authority for the proposition that, even on a judgment in ejectment, possession could not legally be acquired, except under the authority of a writ of possession. The Court there were dealing with the case of possession having been obtained by an improper use of the process of the Court, and for that reason a writ of restitution was awarded. But the right to enter with the consent of the person holding is expressly affirmed, and it is now clearly the law that one having the right to enter may acquire lawful possession, even with strong hand, without being subject to a civil action at the suit of the person ejected: *Pollen v. Brewer*, 7 C. B. N. S. 371; *Dawson v. Wilson*, 11 Q.B. 890; *Burling v. Read*, 11 Q. B. 904; *Jones v. Chapman*, 2 Ex. 803, per Maule, J., at p. 821.

In the present case, however, the evidence is clear that William Dickson entered in William Young's life time, with

his consent, under pressure of the action of ejectment, and in pursuance of the agreement by which the defence in that action was withdrawn. No formal confession of the action under section 52 of the Ejectment Act could, as was contended, be necessary under such circumstances.

We have no doubt that a defendant in ejectment may by counsel or attorney, in Court or Chambers, consent to withdraw his appearance and defence, just as in other actions he may consent to withdraw his plea, leaving the plaintiff to take such subsequent proceedings as are then open to him to bring his action to an effectual termination.

The rule will be discharged, but the plaintiffs must have the costs of the argument in Term, for if the case had rested upon the evidence given at the trial they would have been entitled to succeed.

WILSON, C. J., and GALT, J., concurred.

Rule discharged.

BINGHAM v. BETTINSON.

Chattel mortgage—Absence of redemission clause—Seizure and sale before default—Action for preventing the mortgagor redeeming—Trespass—Trover.

A chattel mortgage in the usual form on certain goods to secure the payment of \$1,700 by half-yearly instalments, contained no redemission clause. It was provided, however, that on default of payment, &c., or in case of the mortgagor attempting to sell or part with the possession of the goods without the mortgagee's consent in writing, &c., the mortgagee might enter and take the land, and sell the same; and also on default of payment the mortgagee might distrain; and further, that it should not be incumbent on the mortgagee to sell and dispose of the goods, but in case of said default should peaceably and quietly have, hold, and occupy the said goods without the let, &c., of the mortgagor. Before any default was made the mortgagee entered and seized and sold the goods, for which the mortgagor brought an action, the first and second counts being in trespass and trover, and the third count being for seizing and selling the goods without the plaintiff's consent before default made, whereby the plaintiff was deprived of his right to redeem, &c.

Held, that the plaintiff was entitled to recover on the third count, the plaintiff being entitled to the restitution of his property on the performance of the condition on which he mortgaged it, which the mortgagee by his wrongful act had prevented from being accomplished.

Semble, per WILSON, C. J., disapproving of *Porter v. Flintoff*, 6 C. P. 340, and the cases following it, that there was an implied right to possession until default, and therefore the plaintiff was also entitled to recover in trespass and trover.

DECLARATION.

First count : Trespass for seizing and taking goods under a false and unfounded claim, that the defendant was entitled to seize and take the same pursuant to the terms of a chattel mortgage made by the plaintiff in favour of the defendant.

Second count : Trover.

Third count : That the plaintiff was a livery stable-keeper and butcher, and by indenture by way of mortgage, dated the 29th of January, 1878, transferred certain goods (describing them) to the defendant to secure the payment of \$700 and interest, payable as follows: \$100 on the 29th of July, 1878; \$150 on the 29th of January, 1879; \$150 on the 29th of July, 1879; \$150 on the 29th of January, 1880; \$150 on the 29th of July, 1880; the last two payments with interest. And the defendant took possession

of the said goods, and with the fraudulent intent of depriving the plaintiff of the power and right to redeem the same, and to make the said payments, unlawfully advertised the said goods for sale, and sold the same before any default or forfeiture was made by the plaintiff, whereby the plaintiff was deprived of the said goods and of the right to redeem the same, and the profits he would have made in his business by use of the same.

Fourth count: Charging that the defendant, as the mortgagee of the plaintiff's goods, seized and sold the same in satisfaction of the money and interest secured by the mortgage, and did not, while he had the goods, keep and use them in a proper manner, and did not sell them for the best price that could be got for the same, but conducted such sale in a negligent and improper manner, whereby the said goods were sacrificed and the plaintiff was deprived, &c.

These two last counts were added by leave of the Judge at the trial.

The pleas to the original counts were :

1. Not guilty.

2. That the goods were not the goods of the plaintiff.

3. That the plaintiff, on the 29th of January, 1878, and before the time when, &c., in consideration of \$700, executed a chattel mortgage on the said goods, and thereby granted, bargained, sold, and assigned the said goods to the defendant, and that it was under and by virtue of such sale by the plaintiff to the defendant of the goods that the defendant seized and took possession thereof, and converted and disposed thereof to his own use, as he lawfully had the right to do.

4. That the mortgage before mentioned was subject to a proviso, that in case the plaintiff paid the defendant the sum of \$700 on the days and times in the said mortgage mentioned, the said mortgage and every matter and thing therein contained should cease and determine and be utterly void : that the plaintiff did not pay the sum of \$700, or any part thereof, according to the terms of the mortgage,

but before the commencement of the suit wholly made default in such payments, and still continues; and that it was under and by virtue of such last named sale of the goods by the plaintiff to the defendant that the defendant did, as he lawfully might, seize and take them into his possession and dispose thereof to his own use and benefit.

5. That the said mortgage contained a proviso that in case the plaintiff should attempt to sell the said goods, or any of them, without the consent of the defendant in writing, it should be lawful for the defendant to take possession of the whole of the said goods and absolutely sell and dispose of the same: that the plaintiff attempted to sell part of the said goods, to wit, a buggy, without the defendant's consent in writing, whereupon the defendant took possession of the said goods and removed the same out of the possession of the plaintiff and sold them, which are the grievances complained of.

Issue.

The cause was tried before Armour, J., and a jury, at Guelph, at th. Fall Assizes of 1879.

A great deal of evidence was given.

The mortgage, as before stated, was dated the 29th of January, 1878. It was in the usual form, a bargain and sale of the goods to the mortgagee. It was to secure the payments as before stated. The mortgagor warranted and defended the goods to the mortgagee against him, the mortgagor, and every one whomsoever; with a proviso, *that on default of payment of any of the principal or interest, the principal then unpaid should become due and payable, or in case the mortgagor should attempt to sell or dispose of, or in any way part with the possession of the goods, or any of them, or permanently to remove them, or any of them, out of the county without the consent of the mortgagee first had in writing, then the mortgagee might, with any assistants he might require, at any time in the day time, enter upon any land, houses, and premises where the goods, or any of them, were, and break or force open any door, &c., &c., for the purpose of taking possession and removing*

the goods. And upon, and from, and after taking possession of the goods, the mortgagee was empowered to sell the goods, or any of them, at public auction or private sale; and out of the proceeds of such sale to pay all moneys as might then be due by the mortgagor, and all expenses incurred by the mortgagee in consequence of the default, neglect, or failure of the mortgagor in payment of the said sum of money with interest, and in consequence of such sale or removal, and to pay the surplus, if any, to the mortgagor.

Provided that the mortgagee might, on default of payment of any part of the principal, distrain for the whole amount of principal then unpaid.

Provided, it should not be incumbent on the mortgagee to sell and dispose of the goods, but in case of default of payment of the said money with interest, as aforesaid, it should be lawful for the mortgagee peaceably and quietly to have hold, use, occupy, possess, and enjoy the said goods, without the let, molestation, &c, of the mortgagor or any person whomsoever.

There was a covenant by the mortgagor to pay such part of the debt and interest which shall not be satisfied by a sale of the goods. The mortgagor put the mortgagee in full possession of the goods by delivering to him the carriage and the said presents.

There was also a covenant by the mortgagor to insure and assign the policy.

The account of the transaction and proceedings was as follows: The plaintiff and the defendant's son were in partnership in the livery and butcher business. The plaintiff put \$1,220 and the defendant's son \$700 into the business. They dissolved on the 29th of January, 1878, the date of the mortgage. The plaintiff continued on the business. He bought his partner out, and for the sum he was to pay he gave the mortgage to the partner's father, the defendant. The plaintiff gave the mortgage, not only upon what had been the partnership property, but upon

everything else he had, to secure the \$700 and interest. The defendant seized everything contained in the mortgage. The mortgagor had to give security for the goods for the eight or ten days they were left with him after the seizure. The plaintiff could not raise the money, so the goods were taken away from him. Bills of sale were published by the defendant, dated the 5th of July, 1878, stating that the goods in the mortgage, specifying them, would be sold under a power of sale contained in the mortgage on the 13th of July, at the town of Palmerston, at two o'clock, P. M., for cash ; and upon the day specified the goods were sold. There was no default in payment of any of the principal or interest, for no payment whatever was payable until the 29th of July, sixteen days after the sale, and about a month after the seizure and removal of the goods by the defendant. The plaintiff on the 5th of July served a written notice upon the defendant forbidding the sale. There was no default then in the payment of principal or interest ; and the jury found the plaintiff had not attempted to sell, dispose of or remove any of the goods. So there was no default of any kind on the part of the plaintiff at the time of the seizure or sale of the goods.

The jury also found, that it was the intention and understanding of both parties to the mortgage that the plaintiff should continue in possession of the mortgaged goods until the breach by him of some stipulation in the mortgage. And they found the whole value of the goods taken by the defendant at the time they were taken to be \$1,350 ; and that the value of the plaintiff's interest in the goods at the time they were taken was \$700.

It is not necessary to state the rest of the evidence.

The learned Judge allowed the plaintiff to add the third and fourth counts, and he directed the verdict to be entered for the defendant, with leave to the plaintiff to move to enter the verdict for him, and for such sum as the Court might think fit.

In Michaelmas term, November 19, 1879, *Guthrie*, Q.C., obtained a rule calling on the defendant to shew cause why the verdict should not be set aside and a verdict entered for the plaintiff for the sum of \$1,350, or \$700, or such other sum as the Court might think fit, on the leave reserved; or why a new trial should not be granted for misdirection and non-direction, and for directing a verdict to be entered for the defendant.

In the same term, December 1, 1879, *Drew*, Q. C., shewed cause. The authorities shew clearly the plaintiff is not entitled to recover, although there was no default by the mortgagor at the time of the seizure and sale, because the legal title was in the defendant, and there are no clauses, conditions, or covenants in the mortgage vesting or securing the possession of the goods in or to the mortgagor during the continuance of the mortgage: *Porter v. Flintoff*, 6 C. P. 335, 340; *Ruttan v. Beamish*, 10 C. P. 90; *McAulay v. Allen*, 20 C. P. 417.

Bethune, Q. C., contra. The existence of a redemission clause is not essential to the mortgagor's retaining possession until default, when from the terms of the mortgage such right may be implied. The whole instrument must be looked at. The proviso contained in this mortgage would clearly point to the mortgagor retaining such possession, and the jury have expressly found that it was the understanding of both the parties that the mortgagor should retain possession until default of some of the stipulations in the mortgage. There are in fact no decisions opposed to this, for although some of the cases would appear to decide the contrary, the point was in no way essential to the decision of the cases, and they are merely dicta in no way binding on the Court. The case of *Albert v. Grosvenor Investment Co.*, L. R. 3 Q. B. 123, and the judgment of Mr. Justice Gwynne in *McAulay v. Allen*, 20 C. P. 417, and in the subsequent case of *Samuel v. Coulter*, 28 C. P. 240, correctly express the law. The plaintiff, however, is entitled to recover under the third count, for seizing and selling the goods, without the plaintiff's consent, before

default, thus depriving him of his right to redeem, for it was on such condition that he mortgaged it. He also referred to the following authorities: *Pierce v. Stevens*, 30 Maine 184; *Cooke v. Walker*, 25 L. T. N. S. 51; *Superior Savings and Loan Society v. Lucas*, 44 U. C. R. 106, 120; *Brown v. Blackwell*, 35 U. C. R. 239; *Herman on Chattel Mortgages*, 215, 219. The part of the rule relating a new trial is not pressed.

December 26, 1879. WILSON, J.—We feel it necessary to reconsider the cases on this subject.

In *Porter v. Flintoff*, 6 C. P. 335, the mortgage was like the present one, and it was held the property in the goods, and therefore the possession which follows the property, was in the mortgagee, who could maintain trespass against the sheriff for seizing them as the goods of the mortgagor. That case was decided contrary to *Wheeler v. Montefiore*. 2 Q. B. 133; because, as Draper, C. J., said, it could not be reconciled with the other cases which were cited, which were *Fenn v. Bittleston*, 7 Ex. 152; *Brierly v. Kendall*, 17 Q. B. 937; *Bradley v. Copley*, 1 C. B. 685; *White v. Morris*, 11 C. B. 1015, and *Watson v. Macquire*, 5 C. B. 836.

The first three of these cases do not apply, because there was an express proviso in each of them that until default the mortgagee should retain possession.

And *White v. Morris* does not apply, because the mortgagee took the legal title *upon trust* to permit the mortgagor to remain in possession until default; and there Jervis, C. J., at p. 1028, after drawing a distinction between a holding *by a proviso* in favour of the mortgagor, and by his holding *under a trust*, said, "which trust is quite consistent with the right to the possession remaining in the plaintiff," who was the mortgagee, and the action in that case was in trespass by him as such mortgagee. Maule, J., at pp. 1020, 1030, refers to the distinction between a mortgagor taking *by a proviso* and *under a trust*.

In *Fenn v. Bittleston*, 7 Ex. 152, the mortgagor having the right of possession till default, his assignees in bank-

ruptcy seized and sold the goods absolutely, and not only the mortgagor's interest in them. At that time the mortgagee was not entitled to take possession, because there was no default. Held, the absolute sale by the assignees of the mortgagor was equivalent to a wrongful sale by the mortgagor, and put an end to the mortgagor's right of possession, and was a conversion, as it prevented the assignees of the mortgagor from returning the goods at the end of the term," and therefore trover was maintainable.

In *Brierly v. Kendall*, 17 Q. B. 937, the mortgagor had the right to remain in possession until default, the mortgagor was to pay on a certain day, or on an earlier day to be appointed by the mortgagees by a notice in writing to be served on the mortgagor twenty-four hours before the day of payment appointed. The mortgagees served the mortgagor with a notice in writing to pay at a day earlier than that named in the deed; but the notice was bad having been served less than twenty-four hours before the day of payment appointed. The mortgagees entered and seized, and sold the goods. Held, the mortgagor's possession having been wrongfully disturbed, he could maintain trespass against the mortgagees; and he recovered damages to the extent of his interest in the goods.

Bradley v. Copley, 1 C. B. 685, merely determined that a mortgagee who had no right to take possession until default, could not maintain an action against a wrongdoer for taking the goods from the mortgagor before default.

And in *Watson v. Macquire*, 5 C. B. 836, the mortgage gave not only no possession till default, but gave no express right to the mortgagee to seize upon default. It contained only a covenant by the mortgagor that on default the mortgagee should quietly enjoy.

There is not one of these cases opposed to *Wheeler v. Montefiore*, 2 Q. B. 133, as supposed by the late learned Chief Justice in *Porter v. Flintoff*, 6 C. P. 335.

Ruttan v. Beamish, 10 C. P. 90, merely affirms the case last mentioned. The decision in that case had nothing whatever to do with this point.

In *McAulay v. Allen*, 20 C. P. 417, the mortgage was drawn precisely as it was in *Porter v Flintoff*, and as it is in the present case.

Hagarty, C. J., at p. 421, said: "Doe dem. Parsley v. Day, 2 Q. B. 147, in which latter case Lord Denman qualifies his then recent judgment in *Wheeler v. Montefiore*;" and that observation is made in *Smith's Leading Cases* there referred to. In *Doe dem. Parsley v. Day*, at p. 156, Lord Denman in referring to *Wheeler v. Montefiore* said, "And, as to the goods, that, by the deed, the plaintiff was not to have possession till the day of payment, which *had not arrived*. Some expressions are used in the judgment as to the construction of the deed; but the real ground of decision was as above stated"

Lord Denman appears to have affirmed his decision in *Wheeler v. Montefiore*, upon the point under consideration in this case, that a mortgage expressed in this manner does not give the mortgagee the right to possession of the goods until default.

Hagarty, C. J., in *McAulay v. Allen*, also says, at p. 421: "A recent case in England, *Albert v. Grosvenor Investment Co.*, L. R. 3 Q. B. 123, throws much doubt on this question," and after quoting some of the passages of that judgment he said: "The language is certainly opposed to the view heretofore entertained in this Court." The learned Chief Justice then decided "to adhere to the judgments already given in this Court, leaving it to the plaintiff, if so advised, to take the case to the Court of Appeal."

Gwynne, J., dissented in opinion from the majority of the Court, saying, at p. 425, that "upon the authority of *Wheeler v. Montefiore*, 2 Q. B. 133, and *Albert v. Grosvenor Investment Co.*, L. R. 3 Q. B. 123, and upon principle, that in this case the mortgagor retained a right by implication to remain in possession of the machinery in the mill until default."

Samuel v. Coulter, 28 C. P. 240, again raised the question, and again Gwynne, J., dissented from the majority of the Court. The decision was the same as in *McAulay v. Allen*, which was held to govern.

In these two cases the actions were by mortgagor against mortgagee for seizing the goods before default on mortgages like the present. The last case follows the first one, and the first one follows *Porter v. Flintoff*, 6 C. P. 535.

Mr. Justice Gwynne, in dissenting, was of opinion *Porter v. Flintoff* is not a decision binding on this question, because, he says, it is in accordance with *Watson v. Macquire*, 5 C. B. 836, and may be sustained on the like ground without touching the question.

The mortgage in the case just referred to was very different from that in *Porter v. Flintoff* as already mentioned.

I do not agree that *Porter v. Flintoff*, was not a decision upon the point in question. It was a decision upon the express point; but it cannot be likened to the case of *Watson v. Macquire*, because of the different form of the two mortgages.

The case of *Porter v. Flintoff*, and the two cases in the Common Pleas, before mentioned, founded upon it, are wholly opposed to the case of *Wheeler v. Montefiore*, and to the late case of *Albert v. Grosvenor Investment Co.*, L. R. 3 Q. B. 123. The decision in *Porter v. Flintoff*, I respectfully submit, was founded on a mistaken similarity between it and *White v. Morris*, 11 C. B. 1015, and *Watson v. Macquire*, 5 C. B. 836, while in fact it is quite opposed to them.

A mortgage in the form there mentioned does, it appears to me, by necessary implication, confer upon the mortgagor the right to possession of the goods until default, according to the cases before mentioned. If that is the effect of the mortgage, then *Brierly v. Kendall*, 17 Q. B. 937, is a decision that trespass is maintainable by the mortgagor entitled to possession till default against a mortgagee who takes possession before default.

I am of opinion the counts in trespass and trover are maintainable, but it is not necessary to go that far in this instance; because if a possessory action cannot be brought it does not follow that the mortgagor, whose property has been sold by the mortgagee without leave, before default, is

without redress. The mortgagor has certain rights reserved to him. He has the right to restitution of his property mortgaged upon performance by him of the condition upon which he granted it. And if the mortgagee, without leave, destroy or dispose of that property, and prevent the redemption of it, he has done a wrong to the mortgagor, and for every wrong accompanied by damage there must be a remedy.

In *White v. Morris*, 11 C. B. 1015, at p. 1020, Maule, J., said the mortgagee was "To have and enjoy, and to use them (the goods) in such a manner as such things are usable."

If a mortgagor who is permitted to remain in possession of goods until default sell them before default, it is a conversion of the goods, because he prevents them being given up to the mortgagee upon default. It is a determination of the bailment to him, and the possessory title reverts to his bailor. "The contract never meant to authorize Malpas," the mortgagor, "to do more than use the chattels, and not to give the use to a third person, certainly not for a larger period than his own term." *Fenn v. Bittleston*, 7 Ex. 152, 159, 160.

A repledge by a pledgee for a larger sum than he has the right to hold for, and before default by the pledgor, does not enable the pledgor to recover in detinue from the second pledgee without tender of his debt: *Donald v. Suckling*, L. R. 1 Q. B. 585; nor in trover: *Halliday v. Holgate*, L. R. 3 Ex., in Ex. Ch., 277; for such a sale is not a conversion.

But the pledgor may be entitled to bring an action of tort against the first or second pledgee "for the damage, if any, sustained by him in consequence of their unauthorized dealing with the debentures": *Donald v. Suckling*, L. R. 1 Q. B. 585, per Blackburn, J., at p. 611.

"If he," the pledgee, "deals with it," the pledge, "in a manner other than is allowed by law for the payment of his debt, then, in so far as by disposing of the reversionary interest of the pledgor he causes to the pledgor any diffi-

culty in obtaining possession of the pledge on payment of the sum due, and thereby does him any real damage, he commits a legal wrong against the pledgor. * * Therefore, for any such wrong an action of trover or detinue, each of which assumes an immediate right to possession in the plaintiff" (the pledgor), "is not maintainable, for that right clearly is not in the plaintiff": Per Willes, J., in giving the judgment of the Court in *Halliday v. Holgate*, L. R. 3 Ex., in Ex. Ch., 299, at p. 302.

In *Johnson v. Stear*, 15 C. B. N. S. 330, where trover was brought against the pledgee for a sale made by him of the goods before the time for repayment had arrived, Erle, C. J., said, at p. 335: "If the plaintiff's action had been for breach of contract in not keeping the pledge till the given day, he would have been entitled to be compensated for the loss he had really sustained, and no more: and that would be a nominal sum only," because it appears the pledgor, who had become bankrupt, and whose assignees were suing, had no intention to avail himself of his right of redemption.

In *Dicker v. Angerstein*, L. R. 3 Ch. D. 600, it was held that a mortgagee with a power of sale in the general unlimited form can, although selling where he has no right to sell, confer by the terms of the power a good title on a *bonâ fide* purchaser; and the Master of the Rolls adds, at p. 604: "If the mortgagor loses his estate through the misconduct of the mortgagee in selling when he has no right to sell, the only remedy would be against him personally for damages."

In the case in hand the mortgagee in a very harsh and unreasonable manner seized and sold the whole of the goods before even the first instalment was due, and has made more than the whole of the money which he was to have received under the mortgage two years in advance, and he has destroyed the trade which the plaintiff was carrying on by means of these horses and carriages. The business—namely, that of a livery stable keeper and butcher—which the plaintiff was carrying on, required his own special attention. It must have been the intention of

the parties that the plaintiff should be allowed to remain in possession of his goods, and to carry on his business, as well, because he alone could use the property to advantage, as because the carrying on of his business was, it is manifest, the only way by which he could possibly pay the defendant his debt. If it is possible to imply a covenant or agreement by which the mortgagor is to be allowed to keep the possession of property until he makes default, it ought certainly to be so in this case, or in a case like it.

If the plaintiff was to have had the possession till default, he can sue in trespass or in trover. If he cannot, and the defendant took the goods, his engagement to restore them upon payment of his debt was broken, and the plaintiff became entitled to sue for that act of the defendant. It was an abuse of his power and duty, because it prevents the plaintiff from ever redeeming his property; and that he has such a right of action is clear upon principle and from the several cases referred to, which will entitle him to recover, at any rate, upon the third count.

I may mention that in *Trent v. Hunt*, 9 Ex. 14, it was decided that a mortgagor of a reversion, left by the mortgagee in receipt of the rent as incident to the reversion, can distrain in the name of the mortgagee for the rent. The decision was made on principle; and in *Snell v. Finch*, 13 C. B. N. S. 651, when counsel said, at p. 655, "The decision" (in *Trent v. Hunt*) "occasioned much surprise at the time." Willes, J., answered, "So did that of *Shelley's Case*, 1 Co. R. 93 b." And Erle, C. J., in giving judgment said: "It seems to me that that" (*Trent v. Hunt*) "was an extremely salutary judgment, because it placed the decision of the Courts of law in accordance with the ordinary course of the transactions of mankind. In the common case of a mortgage, the mortgagor means to remain in possession, and the mortgagee means to hold the assignment as security for the principal sum and interest, leaving the mortgagor in the full exercise of all his rights as landlord." And Willes, J., said, at p. 568:

"Upon consideration, I think the decision in *Trent v. Hunt* is a sound and sensible one."

It is not in anyway surprising that upon a mortgage where the proviso is that on default the mortgagee may enter "for the purpose of taking possession and removing the goods, and upon, from, and after taking possession," may sell them, it should have been decided that "though it is not specifically said so in the deed, the mortgagor has clearly reserved to him a special property in the goods until he has made default." Per Lush, J., in *Albert v. Grosvenor Investment Co.*, L. R. 3 Q. B. 123.

We do not interfere with the decision in *Porter v. Flintoff*, as it has been followed by the two later cases referred to; and as the plaintiff is entitled to succeed on the third count, which does not assert any possessory claim to the property. In any future case arising I am not prepared to say, speaking for myself alone, that I shall feel compelled to follow it.

By deciding contrary to *Porter v. Flintoff* we should not be unsettling many transactions which could have taken place upon the faith of it, for we hope there are not many mortgagees disposed to act so harshly as this defendant has acted, but we should, so far as we could, be taking away from them the only justification they have for abusing the law.

The rule will be absolute therefore to enter the verdict for the plaintiff on the third count with \$700 damages, the value of the plaintiff's interest in the goods as assessed by the jury over and above the mortgage debt, and discharged as the residue.

GALT and OSLER, JJ., concurred.

Rule accordingly (a).

(a) See the case of *Williams v. Stern*, Weekly Notes, Dec. 27, 1879, p. 214, commenting on *Albert v. Grosvenor Investment Co.*, L. R. 3 Q. B. 123.

WOODMAN v. BLAIR.

Breach of promise of marriage—Excessive damages—New trial.

In an action for breach of promise of marriage the jury gave \$4,500 damages; and the case having been fully and fairly brought before them, and there being evidence to justify their verdict, the Court, though considering the amount unusually large, refused to interfere.

THIS was an action for breach of promise of marriage.

The declaration was in the ordinary form, alleging that before action defendant had married another person.

Plea. Non assumpsit.

The case was tried before Morrison, J. A., and a jury, at London, at the Fall assizes of 1875.

It appeared that the plaintiff, a farmer's daughter, was, when the courtship began, between eighteen and nineteen years of age: that the defendant, who was an inspector for a loan society, in the city of London, was a widower of about forty-five years old, and possessed of means in land and money to the amount of \$50,000.

He paid his addresses to the plaintiff for about a year and eight months, and during that time visited her at her father's house once or twice a month, and frequently drove her out, and made her several presents.

It also appeared that he had written her about eighty letters and several amorous poetical productions; in which letters and poetry marriage was mentioned and indicated. In less than a year after the courtship began the defendant succeeded in inducing the plaintiff to burn all the letters and poetry written by him up to that time, under pretence that he did not wish the plaintiff's friends to see them and criticise them, and under a promise that he would, on his return home to London, write her a "beautiful letter" that would compensate for all the rest.

After the letters were burnt the defendant became more indifferent towards the plaintiff, and, though he continued to correspond with and visit her, his letters and conduct were more guarded.

It also appeared that, at an early stage of the courtship, the plaintiff's father, in presence of his wife and of the plaintiff, asked the defendant what his intentions were towards the plaintiff, and if he intended to marry her? and he then said "Yes," and that "his intentions were honourable."

The jury found a verdict for the plaintiff, with \$4,500 damages.

In Michaelmas term, November 24, 1879, *Bethune*, Q.C., obtained a rule *nisi* for a new trial, on the ground of excessive damages only; and filed an affidavit of the defendant, in which, however, the extent of his means were not denied.

During the same term, December 4, 1879, *B. L. Doyle* shewed cause. The Court will not, in cases of this nature, disturb the verdict on the ground of excessive damages. The principle which governs the Court is, not whether they think the damages too large, but whether they are so large as to satisfy the Court that the verdict was perverse, and the result of gross error, misconception, or undue motives on the part of the jury: *Berry v. DaCosta*, L. R. 1 C. P. 331; *Smith v. Woodfine*, 1 C. B. N. S. 660; *Gough v. Farr*, 1 Y. & Jer. 477; *Duberley v. Gunning*, 4 T. R. 651; *Hilliard* on New Trials, 2nd ed, 561-3, and cases there collected. In the case of *Phillips v. London and South Western R. W. Co.*, L. R. 5 Q. B. D. 78, which was the converse of the present, namely, where a new trial was granted for smallness of damages, it was granted on the ground that then there were figures and dates from which it was apparent full justice had not been done to the plaintiff. In the present case the Court had not the advantage of any such material. The defendant's affidavit cannot be read on this motion, for the purpose either of explaining or contradicting the evidence given on the trial: R. S. O. ch. 62, sec. 6; *Smith v. Woodfine*, 1 C. B. N. S., at p. 662; *Ling v. Croker*, 2 C. B. N. S. 760; *Hawker v. Seale*, 17 C. B. 595; *Henderson v.*

Wallace, E. T. 2 Vict., cited in *Rob. & J.* Dig., 2587. There is ample evidence to justify the verdict. It is not asserted that the defendant's means were over estimated on the trial. The verdict would scarcely, if at all, exceed the interest for one year at 8 per cent. on the value of the defendant's estate ; and it was shewn by abundance of testimony on the trial that plaintiff had suffered great distress of mind and body on account of her desertion by the defendant, while no satisfactory explanation was offered for such desertion.

Mr. Bethune, contra. The question is one solely for the discretion of the Court in view of all the facts. He contended the damages were too large, but he could not say there was any fixed rule to guide the Court in such cases.

At the conclusion of the argument the Court were of opinion that the rule should be discharged. They considered the damages were unusually large, but felt a difficulty in interfering with the verdict. The case, they said, in some respects, was very strong against the defendant. There was no doubt as to the promise having been made ; the value of the defendant's estate was not disputed, and upon the principle of the decided cases which had been referred to, they could not see their way to interfering with the verdict. The defendant's conduct in persuading the girl to give up the letters he had written to her, destroying them, and then after that continuing his visits to her, and not committing himself, as he thought, was no doubt taken into consideration by the jury. He evidently thought that he would not be liable if a written promise could not be shewn.

Rule discharged.

THE CORPORATION OF THE TOWN OF PETERBOROUGH V. HATTON.

*Police magistrate—Salary and fees—Police clerk—Appointment and fees of
—R. S. O. ch. 174, sec. 412, construction of.*

The salary paid to a police magistrate of a city or town, under R. S. O. ch. 172, sec. 1, covers all cases that may come before him, arising within the city or town; so that he is not entitled to any fees except in what may be called purely country cases, e.g., where the charge arises and the parties reside out of the city or town, or where it was a local matter, as for injury to property situate out of the town or city.

A town clerk, being also town treasurer, did not act as police clerk, and no appointment having been made by the municipal council, the police magistrate appointed a clerk from 1871 to 1877, which appointment the council, with full knowledge and notice thereof, never repudiated.

Held, that under these circumstances the clerk must be considered as if appointed by the council, and entitled to retain the fees given to police clerks by the statute.

Held, also, that the police magistrate was not entitled to charge these fees himself, and to pay the clerk a salary in lieu thereof.

A police clerk of a town remunerated by a fixed salary paid over to the municipality, in accordance with the statute, the fees received by him, amongst them being the fees for hearing and determining cases, and for records of convictions.

Held, that the police magistrate, for the reason and except as above stated, could not claim such last named fees.

Held, also, that the corporation of the town were not entitled to recover from the defendant any fees received by him.

Held, also, that sec. 412, of the Municipal Act, R. S. O. ch. 174, applies to cases arising both under the Dominion and Provincial Acts.

THIS was an action brought by the plaintiffs against the defendant to recover an unascertained sum of money, to be ascertained as hereinafter provided, should it appear that the plaintiffs are entitled to recover anything against the defendant, by reason of the matters herein-after set out. And by consent of parties, and by the order of Mr. Dalton, Q. C., dated 22nd November, 1879, according to the Common Law Procedure Act, the following case has been stated for the opinion of the Court without pleadings.

The plaintiffs are the municipal Corporation of the town of Peterborough, and the defendant has been since the year 1871, and still is, police magistrate, duly appointed as such, in and for the town of Peterborough, in the

county of Peterborough. The defendant, as such police magistrate, has been regularly paid by the plaintiffs the salary which by the statute in that behalf is made payable by them to him. The defendant, in his capacity as such police magistrate, and *ex-officio* justice of the peace for the said town and county, has received fees, which he has retained to his own use, and refused to account for or pay over to the plaintiffs, in the following cases, viz.:

1. Fees payable under the statute in that behalf, to justices of the peace and their clerks in proceedings before the defendant as such police magistrate, and justice of the peace, in cases of non-payment of wages arising within the town of Peterborough, wherein the informations were taken by him and summonses prepared by clerks paid by him.

2. Fees payable under the same statute to justices of the peace or their clerks, in cases before the defendant, which have not been disposed of by convictions or dismissals, but which have been abandoned or withdrawn by consent of parties, the informations having been laid before defendant, and summonses and subpoenas prepared by him and clerks paid by him.

3. Fees payable under the same statute to justices and their clerks on binding persons to keep the peace, the informations having been taken by defendant, and warrants and papers having been prepared by him or clerks paid by him, the foregoing being matters arising from the time of the defendant's appointment to the office of police magistrate as aforesaid, up to the third day of March, 1877, during which period there existed no clerk of the police court of Peterborough, save the clerk of the town, who was under the Municipal Act clerk thereof, but he being also treasurer of the said town refused and neglected, although specially instructed by resolution of the town council, to perform the duties of such police clerk, and such duties were therefore performed by defendant, or persons employed by him, which the plaintiffs never repudiated, although duly informed thereof, during the whole of the said period.

4. Fees payable under the same statute to justices and their clerks, in all cases arising outside of the town of Peterborough, but within the county of Peterborough, the defendant being in such county cases obliged to perform the duties of clerk by himself or persons employed by him.

The questions for the opinion of the Court are as follows :—

1. First. Are the plaintiffs entitled to any fees in respect to such matters, and, if so, what fees and in what cases ? Or, is the defendant entitled to retain the same or any part thereof to his own use ; and, if yea, what fees and in what cases ? And are the plaintiffs entitled to sue for and recover from the defendant any of such fees heretofore received by him ?

2. Secondly. In all cases other than those above mentioned, is the defendant entitled to retain to his own use the fees allowed for the following services, if performed by him or clerks paid by him, viz. :—(a) Fee for drawing and swearing informations ; (b) preparing and issuing summonses, warrants, subpœnas, warrants of commitment, taking recognizances of bail, hearing fees, drawing convictions, orders for sureties to keep the peace, orders for payment of wages, and warrants of distress on non-payment ?

3. Thirdly. A clerk of the police office of the said town payable by a fixed salary, having been duly appointed on the thirteenth day of March, 1877, by the plaintiffs, and having performed the duties of the office since that date, and having received and paid over to the plaintiffs all fees received in cases before the defendant, including the fees for hearing, determining, and drawing records of convictions, is the defendant entitled to recover the fees so paid to the plaintiffs for hearing and determining, and for records of convictions ?

Fourthly. Does the Municipal Act, R. S. O. ch. 174, sec. 412, apply to cases arising under the criminal law of the Dominion, so as to deprive a police magistrate within its

provisions of any fees in such cases, or only to fees in cases arising under Provincial statutes?

It is agreed that the accounts between the plaintiffs and defendant shall be taken according to the finding of the Court upon the several matters above stated by Edgecombe Pearse and William Eastland, the auditors of the town of Peterborough, whose finding shall be final and binding; and that judgment shall be entered in this honourable Court for the plaintiffs or the defendant as upon a plea of set off for the amount so found due by either of the said parties to the other, with costs on such scale as may be decided by the order of a Judge in Chambers; and that this reference may be made a rule of Court, and is subject to the clauses of the Common Law Procedure Act.

In this term, December 5, 1879, the case was argued.

Bethune, Q.C., for the plaintiffs.

McMichael, Q.C., and *Hector Cameron, Q.C.*, for the defendant.

The following cases were referred to: *Dickinson's Quarter Sessions*, 6th ed., p. 90, 91; *Corporation of Lambton v. Poussett*, 21 U. C. R. 472; *Re Dartnell and Quarter Sessions of Prescott*, 26 U. C. R. 430; *Archbold's J. P.*, 6th ed., vol. ii., p. 1335-6.

The statutes referred to are set out in the judgment.

December 26, 1879. WILSON, C. J., delivered the judgment of the Court.

There is and has been a police magistrate in the town of Peterborough for several years past. The defendant, as such police magistrate, has been duly paid his salary under the statute in that behalf—now contained in the R. S. O. ch. 72, sec. 1.

By that section every city and town having more than five thousand inhabitants shall have a police magistrate.

By section 4 of that Act, "Every police magistrate shall *ex officio* be a justice of the peace for the city or town for which he holds office, and also for the whole county or

union of counties in which, for either judicial or municipal purposes, such city or town is situate."

By section 6, the police magistrate is the only justice of the peace who has authority to act as a justice of the peace "in any case for any town or city, except at the Courts of General Sessions of the Peace, or in the case of the illness, absence, or at the request of the police magistrate."

And by section 7, "the police magistrate appointed for any city, town or place, and sitting at a police court, or other place appointed in that behalf, shall have full power to do, alone, whatever is authorized by any statute in force in this Province relating to matters within the Legislative authority of the legislature of the province, to be done by two or more justices of the peace; and such magistrate shall have such power while acting any where within the county for which he is *ex officio* a justice of the peace."

By the Municipal Act, R. S. O. ch. 174, sec. 411, the council of every town and city shall establish a police office, and the police magistrate shall attend daily at the police office, or at such times and for such period as may be necessary, "for the disposal of the business brought before him as a justice of the peace."

By section 412, "The clerk of the council of every city or town, or such other person as the council of the city or town appoints for that purpose, shall be clerk of the police office thereof, and perform the same duties and receive the same emoluments as clerks of justices of the peace; and in case the said clerk is paid by a fixed salary, the said emoluments shall be paid by him to the municipality, and form part of its funds, and such clerk shall be the officer of and under the police magistrate."

By R. S. O. ch. 77, sec. 1, "the fees mentioned in schedule A to this Act, and no others, shall be and constitute the fees to be taken by justices of the peace, or by their clerks, for the duties and services therein mentioned."

And schedule A refers to fees to be taken, as I read it, in cases of assault, trespass, or other misdemeanor.

Section 2 and schedule B relate to fees to be taken when such fees are not expressly prescribed by any statute ; and the schedule relates to all cases before justices.

By R. S. O. ch 89, sec. 1, "In all cases not otherwise provided for, in which, by any Imperial statute in force in Ontario, a fine or penalty is imposed, in respect to matters within the legislative authority of the Legislature of Ontario, and the whole or any part of the fine or penalty is appropriated * * to any purpose, inapplicable to the existing state of Ontario, such fine or penalty * * shall be paid to the treasurer of the county or city in which the conviction has taken place."

The defendant claims fees payable under the statute in proceedings taken by him as police magistrate, "for non-payment of wages arising within the town of Peterborough," wherein the informations were taken by him, and summonses were prepared by clerks paid by him.

These complaints are made under R. S. O. ch. 133, sec. 12, and may be made before any justice of the peace.

It does not appear to me the police magistrate can claim fees for himself as a justice of the peace under ch. 77, because in the case put the matter was one "arising within the town," of and for which he is police magistrate. They are claimed by him "for the disposal of the business brought before him as a justice of the peace." The town of Peterborough is one of those towns which it is said by ch. 72 "shall have" a police magistrate ; and the salary provided for by that Act is, and must, be for his duties and services as such police magistrate. If it is not for these, there is nothing else it can be for.

Then as to the claim made for fees paid to a clerk in such cases.

I am of opinion, as a general rule, no claim can be made for them, because the town clerk is, by law, the clerk of the police office and of the police magistrate ; and if he do not act then "such other person as the council appoints for that purpose shall be the clerk of the police office."

The council may attach a salary to the office, which

shall be in lieu of fees ; and then the clerk is to deliver to the treasurer of the town the fees he receives ; and if there be no salary the clerk retains the fees to his own use.

Here, however, it appears the town clerk is also the town treasurer, and he could not act as police clerk, and the police magistrate, from 1871 until the 3rd of March, 1877, appointed a clerk, which appointment the plaintiffs never repudiated, although they had full knowledge and notice of the same during all that time.

In this case, under these circumstances, I am of opinion it may be considered as if the council had, as a body, appointed the clerk.

It is true such a clerk, if appointed by the council, is required to make a declaration to execute his office faithfully, and may be required to give security for the due performance of the duties of the office. See Municipal Act, secs. 266, 273, 274, 276 ; and it is true the declaration is to be made "before entering on the duties of the office ;" but I cannot say that a person who does act in the office before the making of the declaration is not an officer or acts illegally, when he does so with the assent of the corporation. Then, too, the plaintiffs must have known they had given the clerk no salary ; they must have known, also, he was receiving and appropriating to his own use the fees of a clerk of a justice of the peace, and under these circumstances the clerk is entitled to retain such fees.

I do not think the defendant had or has any right to charge the fees for his clerk which the statute gives to the clerk, if he has done so—which I rather infer to be the case—and to pay the clerk a salary in lieu of them, although the council may do so, specially by statute. But, if it were not for that statute, the council could not have done so : *Corporation of Liverpool v. Wright*, 5 Jur. N. S. 1156 ; *Ex parte Harnden*, 5 Jur. N. S. 852.

The like observations apply to the second and third heads of statement. As I understand the case, the matters, as under the first head, arose *within the town*. If they did not, they will be considered under the fourth head.

As to the fourth class of cases arising without the town of Peterborough, but within the county, which cases come before the defendant as a justice of the peace, it is necessary to settle what cases do or do not arise *without* the town of Peterborough.

A county justice takes cognizance of all magisterial business brought before him of which he has jurisdiction, wherever the case, matter, offence, or charge may have arisen. The police magistrate for a town or city must do the same, as he has an exclusive magisterial jurisdiction in that particular part or the section of the county, which is in effect for that purpose separate from the county. If for instance, a servant is complaining of a master for non-payment of wages or otherwise, under R. S. O. ch. 133, in which case the complaint may be made against the master in any county in which he is found, and the master is found in the town of Peterborough, the defendant would be obliged to act, and would act as police magistrate of the town where the master was found; and in so doing, would be doing the business of and for that town, because no other magistrate could do it.

He would not be entitled to charge the usual fees of a justice of the peace in such case. I do not consider that a county case. It may not even have arisen in a county in its qualified form, but in a police town or city—Hamilton or Kingston, for instance. So if one who had threatened another in the county with bodily injury were apprehended while residing in Peterborough, and was bound over there to keep the peace, that would, in my opinion, be a case in which the police magistrate could not charge fees, and the like as to an assault committed in the county, but the defendant was residing in and taken in the town.

In cases of extradition, the police magistrate would not be entitled to fees, if fees are payable in such a case to any justice of the peace.

If the police magistrate were to go into the county in any case, there to take cognizance of and determine a charge arising in the county, and the parties resided there,

he would be entitled to fees. So if in the last case he sat in the town or city, he would also be entitled to fees ; and so also, I think, where the matter was local, as for an injury to property situate out of the town or city, when the parties lived within the city, or to authorize the breaking open of doors in the county to enable the landlord, a resident of the town, to make a distress for rent under the statute ; or where proceedings are taken before him under "The Liquor License Act," for infractions of that Act beyond the limits of the town or city.

And if a purely county case were brought before him, the cause arising and the parties being resident there, and the summons or warrant happened to be served or executed in the town or city, the magistrate would be entitled to his fees.

The fourth head, to which I have been referring, must be answered in this general manner, because it is too vague to be more specifically answered.

The plaintiffs are not entitled to recover from the defendant fees received by him, whether rightfully or wrongfully received.

There is a fifth class of cases stated.

The plaintiffs appointed a police clerk on the 13th March, 1877, and have paid him by a fixed salary, and the clerk has received and paid to the plaintiffs all fees received in these cases before the defendant as police magistrate ; and the question is, whether the defendant is entitled to recover the fees so paid to the plaintiffs, for hearing and determining, and for records of conviction ?

I can only say the police magistrate is entitled to no fees whatever, excepting, as a rule, when he is acting as a justice of the peace in what may be called purely county cases. What these are it is impossible to classify or to define, otherwise than as before specified.

We can determine whether a certain case, of which we know all the facts, is a case in which fees may or may not be charged by the police magistrate ; but we cannot answer more precisely than we have done so general and

undefined a question. Nor can we undertake to say, whether a record of conviction is prepared by the justice or by the clerk. We can only say, if the justice do that work, his salary, in our opinion, covers such services ; and if the clerk do it, *he* is to charge the fee, and to pay it over, by the statute, to the plaintiffs.

There is still a sixth head of items submitted for our consideration : whether the Municipal Act, sec. 412, applies to cases arising under Dominion statutes, or only to cases arising under Provincial statutes ?

We answer, both to Dominion and to Provincial statutes.

If we have not quite disposed of any matters which the parties desired to be more expressly decided, the case must be amended, or a new case stated, which will enable us more specifically to deal with it.

Our opinion on the matters submitted is as we have already stated it. We cannot give it more definitely, or in a more condensed manner than we have done.

Judgment accordingly.

MEMORANDA.

In this Term the following gentlemen were called to the Bar :—

JAMES CULLEN LILLIE, WILLIAM JOHN FRANKS, JAMES WILLIAM HOLMES, JOHN SANDFIELD MACDONALD, GERARD HOLMES HOPKINS, WILLIAM JOSEPH DELANEY, WILLIAM MCKAY READE.

SITTINGS IN VACATION

AFTER MICHAELMAS VACATION, 1879-80.

IN RE CRUICKSHANK AND CORBY.

Arbitration—Making submission a rule of Court—Reception of evidence in the absence of party—Setting aside award.

Where there was a written submission of existing differences to the award of an arbitrator to be appointed by a person named in the submission, and in pursuance thereof such person verbally appointed the arbitrator who entered upon the reference and made his award.

Held, that the submission could not be deemed to be a parol submission, merely because the arbitrator was appointed verbally, and that the submission was properly made a rule of Court.

In this case the arbitrator having received statements and information upon the subject in dispute, in the absence of one of the parties, without communicating to him that he had done so, the award was set aside, with costs.

On the 20th May, 1879, *E. Martin*, Q. C., on behalf of Robert Cruickshank, obtained from Osler, J., sitting for the full Court, a rule *nisi* calling upon Lewis R. Corby to shew cause why the award made by Eli VanAllen between the parties should not be set aside, on the following grounds:—

1. On the ground of misconduct of the said arbitrator in receiving evidence after the taking of evidence on said arbitration was finally closed.
2. On the ground of misconduct in receiving evidence and suggestions from the said Lewis R. Corby and one C. W. Mulligan in the affidavits named, privately and in the absence of said Robert Cruickshank and without notice to him.

And that the said award should be set aside, or so much thereof as seeks to charge the said Robert Cruickshank, or deduct from his claim, the sum of \$120 mentioned in the

affidavits filed, as being charged against him for delay in not completing the building in the affidavits mentioned.

The rule was drawn up on reading the rule making the reference to arbitration a rule of Court, a copy of the award, and the affidavits, and other papers filed.

The submission was in the following form :—

“ HAMILTON, February 17, 1879.

“ We hereby mutually agree to accept a party who shall be selected by C. W. Mulligan, architect, to examine all the extras and items connected with four houses erected on Hughson street, Hamilton; and we hereby bind ourselves to accept his decision as final and binding on both of us, and that we will not resort to any means of law after receiving such decision, and that the expense of such arbitration shall be jointly paid by us.”

In pursuance of this submission, Mulligan verbally appointed one Eli VanAllen as arbitrator, and he made the following award :—

“ HAMILTON, April 12th, 1879.

“ W. C. MULLIGAN, Hamilton, Ont.

“ Mr. R. Cruickshank and Mr. Corby, both of the city of Hamilton, having signed an agreement referring certain items in dispute between them to arbitration, and you to choose the arbitrator; you having therefore chosen me, and the both parties above consenting, I have therefore examined the items in dispute as referred to me by you, and after careful consideration to the best of my ability, I find Mr. Cruickshank is entitled to the sum of four hundred and fifty-nine dollars and sixteen cents (\$459.16).

“ Yours, &c., E. VANALLEN.”

The other facts material to the questions decided are sufficiently referred to in the judgment of the Court.

On November 18, 1879, *A. Bruce* (Hamilton) shewed cause.
E. Martin, Q. C., contra.

January 13, 1880. OSLER, J.—On the argument Mr. Bruce took the preliminary objection that as the arbitrator was not named in the submission, but was verbally appointed

by Mulligan, the submission was by parol only, and therefore could not regularly be made a rule of Court.

In *Ex parte Glaysher*, 3 H. & C. 442, there was a motion to make a covenant in a lease, to refer disputes which might afterwards arise to arbitration, a rule of Court. Disputes having arisen, the parties by parol (verbally) appointed arbitrators, who by parol appointed an umpire. The motion was refused.

Pollock, C. B., said, at p. 444 : "This is, in truth, a submission by parol, in pursuance of an agreement to refer *in futuro*, no arbitrator being at the time appointed or named, and no matter being in dispute. And at p. 445 : "There is an obvious distinction between an agreement to refer to an arbitrator *to be appointed* any matter of difference which may thereafter arise, and an agreement to refer to an arbitrator named a matter which has already become the subject of dispute. If there be a general agreement to refer future disputes to one or more persons to be appointed, and in pursuance of that disputes are referred, the submission is by parol, although the agreement is by deed."

In *Re Newton and Hetherington*, 19 C. B. N. S. 342, a rule *nisi* was granted and afterwards made absolute, to make a similar agreement for submission to arbitration and the appointment of arbitrator, in pursuance thereof, a rule of Court.

Ex parte Glaysher, 3 H. & C. 442, was relied upon as an authority against the application.

Erle, C. J., said, at p. 348 : "The instrument upon which the question here arises contains a submission upon a contingency. * * In pursuance of the stipulation in the indenture, one party has named an arbitrator, and has called upon the other to name one on his part; the latter refuses to do so; and the question is, whether we can take notice by affidavit that the contingency has happened upon the happening of which the arbitrator appointed for one party was to be the arbitrator authorized to act for both. I am of opinion that we can. We therefore make the deed, with the appointment verified by affidavit, a rule of Court

under the authority of the statutes. It is very like the ordinary case of the appointment of an umpire on two arbitrators differing. It is only upon the contingency of the arbitrators disagreeing that the umpire is to be appointed to act. In that case the submission may be made a rule of Court, though there be no writing (except the recital in the award) to shew that the arbitrators have disagreed."

Willes, J., said, at p. 350: "As to * * * *Ex parte Glaysher*, it is enough to say that that case is inapplicable, because there the submission was by parol. Here, it is clear, there was an appointment in writing, which by the agreement of the parties was to become the appointment of both on the refusal of one upon due notice to appoint an arbitrator on his part."

In *Re Wilcox and Storkey*, L. R. 1 C. P. 671, there was an agreement in writing to refer future disputes to such member of the firm of B. & Co. as should be appointed by that firm to undertake the reference. Disputes having arisen, B. & Co. in writing appointed T., a member of their firm, as arbitrator. The agreement for reference having been made a rule of Court, a motion was made to set aside the rule, on the ground that there was no submission in writing within the Act. The Court followed the last case, holding that there was enough in writing to put upon the files of the Court.

In my opinion these cases are distinguishable from the case in judgment. They all relate to agreements to refer future differences upon their arising, and they do not deal with the case of an actual submission to refer existing differences.

In *Parkes v. Smith*, 15 Q. B. 297, the agreement of reference related to the case of future differences arising upon the dissolution of the partnership between the parties, and the question was, whether it was within the statute 9 & 10 Wm. III., ch. 15. The plaintiff contended that the statute extended only to submission of differences actually existing: that an agreement to submit to reference

and an actual submission were not the same thing. The arbitrator was named in the agreement, but the judgment of the Court is not put on this ground.

In *Ex parte Glaysher*, already referred to, the distinction between an agreement to refer disputes arising *in futuro*, and a reference of existing differences is insisted on by the Court, *Parkes v. Smith*, 15 Q. B. 297, being supported on the ground that the arbitrator was named in the agreement. In the later cases in the Court of Common Pleas, also referred to, *Ex parte Glaysher* was evidently relied upon as authority for the proposition that an agreement to refer future differences was not a submission within the statute, but the Court distinguished them on the ground that in those cases the appointment of the arbitrators was in writing, and treated the *appointment* as being, by force of the prior agreement to refer, the actual submission.

It is the submission which is to be made a rule of court, and it is, I think, a sufficient submission for that purpose if some means are provided for ascertaining the arbitrators. In *Termes de la ley*, the submission and the arbitrators are treated as distinct. "And to every award are five things incident, *scil:* matter of controversy, submission, parties to the submission, arbitrators, and delivering up of the award:" *Dyer*, 217a.

The reason why a parol submission cannot be made a rule of court is, that by the terms of the statute some written instrument is inferred.

In this case there is a written instrument by which the parties under their hands agree to refer their existing differences to an arbitrator to be named by a person appointed in the instrument to name him. That instrument appears to me to come within the Statute of William as a "submission of their suit to the award or umpirage of any person or persons," and within sections 201 and 202 of the Common Law Procedure Act, R. S. O. ch. 50, as a "submission to arbitration in writing not under seal," which may, by force of those statutes, be made a rule of court.

Where there is a written submission of existing differences to the award of an arbitrator to be appointed by another person to be named in the submission, and no particular form of appointment is provided, there seems to be no more reason for calling the submission a parol submission merely because the arbitrator is appointed verbally, than there is for doing so when two arbitrators having differed, verbally appoints an umpire, which they may do unless the submission appoints a more special form of appointment. There is no authority that I have been able to discover that in the latter case the submission may not be made a rule of court.

In the case of *Oliver v. Collings*, 11 East 367, where the motion was to attach the party for non-performance of the award, the only effectual appointment of an umpire was clearly a verbal appointment, and the submission must have been made a rule of court before the motion was made. On the same point *Ray v. Durand*, 1 Chamb. R. 27, and *Osborne v. Wright*, 12 U. C. R. 65, may also be referred to.

In all cases of arbitration, the arbitrator and umpire derive their authority from the submission.

In the case of *Re Bradshaw's Arbitration*, 12 Q. B. 562, it was held that the appointment of the umpire need not be made part of the rule to make the submission a rule of Court. The reference in that case was under the Lands Clauses Consolidation Act, but the ground of the decision applies equally to all submissions. The practice, however, undoubtedly is, in other cases where there is an appointment in writing, to make it a part of the rule.

I think the submission in question here has been properly made a rule of Court, and therefore proceed to consider the application on the merits.

Cruickshank, the applicant, deposes that after the reference had been accepted, and shortly before the 10th April, Corby, VanAllen, Mulligan, and himself went over the buildings together, and Corby and he explained their respective views to the arbitrator, and Mulligan gave such

information as he was asked for : that they then parted on the agreement that Van Allen should proceed and make his award without taking further evidence, or making further reference to either of them. When he received notice of the award, he demanded from Van Allen a statement shewing the items. The latter then shewed him a book containing the items of the account and credits, which had been left with Mulligan, whose clerk made a copy of it, which was annexed to the affidavit.

This account was headed " Extra carpenter work on Mr. Corby's buildings." The total amount allowed for all extra work was \$1,010.76, from which was deducted certain credits, amounting to \$431, and a further sum of \$120 " for loss by delay of buildings after allowance of reasonable time for extra work," in all \$551.

The deponent proceeded to state that having examined the account he went to see VanAllen, accompanied by one William Allen, to ascertain on what evidence he had made the award, being dissatisfied with what he contended were erroneous statements of the contract price of some of the articles, and with the allowance of any sum for delay a matter which, as he also contended, had not been submitted to the arbitrator.

Much of the evidence on both sides was directed to this account, and as to the arbitrator having received evidence from Mulligan, one Haskins, and Corby, when Cruickshank was not present and without notice to him ; but the only item to which it is necessary to refer is that relating to the charge for delay. As to this Cruickshank said, referring to the interview between himself, Allen, and the arbitrator: " I protested against the charge of \$120 made against me in said account for delay in completion of the said buildings. It was never referred to nor discussed before Van Allen in my presence. VanAllen replied that he took the contract and found when the buildings should have been finished; then he found what Corby could have rented them for, if finished, and allowed him one-half : that Van Allen further said, that pending the reference a Mr.

Haskins asked him if he was arbitrator in the dispute between Corby and myself, to which VanAllen replied that he was, and then Haskins said he would have rented one of the houses if finished, but could not wait: that said VanAllen further stated that what information Corby could not give him, he got from Mulligan. I then complained that he had not let me know he was getting information behind my back in this way, and that I had not been heard, to which he replied that he had no right to go to any one, but as Mulligan and Corby gave him the information he acted on it; and further, that he called at Mulligan's office and got such information as he wanted: that I never had any notice of any appointment being made to take evidence or proceed with the reference except on the occasion already referred to, and the evidence on both sides was then finally closed at such meeting, and that the evidence above referred to was given after such meeting, and in my absence, and without notice to me." He then denied that there had been any delay on his part in completing the building, and averred that he could have established this, if he had been allowed an opportunity of doing so, and if the question had come within the scope of the reference.

William Allan made an affidavit in which he corroborated the statement of Cruickshank as to the foregoing conversation, and further deposed that during the conversation Cruickshank objected that VanAllen had no right to deal with the question of delay, as that matter was never referred to him: that Van Allen said he knew it was a question he could not settle, but Corby and Mulligan wanted him to decide it, and he did the best he could to please all parties.

Affidavits in answer were made by VanAllen. In the first, sworn on the 3rd June, 1879, he deposed that after the reference he met the parties and Mulligan at the latter's office. Mulligan said he had prepared a statement of the items in dispute, having no sums filled in as values, and this statement was taken up and discussed item by item the discussion occupying two or three hours: that the question

of Corby's loss by delay in completing the work was discussed on that occasion, and it was agreed that it should be dealt with and decided by the arbitrator, it was set down in such statement, and it was then understood and agreed that the said statement contained the matters on which the deponent was to arbitrate between the parties, and he accordingly took it as the basis on which he was to proceed, and on which he did in fact proceed: that Cruickshank had his own account with him while the statement produced by Mulligan was being gone over, and had an opportunity of comparing one with the other, and the deponent believed he did then compare them: that shortly after this meeting the same parties all went to view the buildings and the works and matters in dispute, and the arbitrator then had the above statement with him, and used and referred to it, and both parties knew it, and that it was so being used and referred to as shewing the matters on which the deponent was to arbitrate. The deponent further stated that he dealt with the whole of the items contained in such statement and with no others, and by the award he intended to and did in fact dispose of all the items in the statement. The deponent went on to state that the only occasion, subsequent to the one first referred to, on which he spoke to Corby before making his award, was when he went to the buildings to make certain measurements and valuations. "I had to get Corby to open the buildings to afford me access. He came and opened the doors for me, and he then complained to me of the defective execution of some of the works which came under the contract proper, and pointed the same out to me, but I considered I had nothing to do with these as they did not come under the reference to me, and Corby did not speak to me or offer any information about any of the items contained in the statement and dealt with in the award."

As to the claim for delay and the interview with Haskins, the arbitrator said: "The loss to Corby by delay of the said Cruickshank in completing his work was * * very fully discussed on the two occasions referred to, and

Cruickshank, in fact, admitted that he was three months behind in completing. * * The information given me by Haskins, on the occasion when I saw him in the Court House, was entirely voluntary on his part, and unsought by me, and I believe his being there and speaking to me on the subject was accidental."

The statement referred to was not annexed to the affidavit.

The affidavit of L. R. Corby as to the meetings at the architect's office and the house, and as to the agreement in reference to the claim for delay, and to the interview between himself and the arbitrator, was to the same effect as that made by the arbitrator. He denied having given any information to the latter on the matters in dispute. As to Haskins he said :

" 4. That W. F. Haskins did take one of the houses in question, and afterwards gave it up, because it was not completed in time for his purposes : that I met the said Haskins on the street before the time at which said Eli Van Allen was appointed arbitrator, and I asked him if he had a copy of the letter which he wrote me giving up such house, and he replied that he had a copy of it at his place of business, and if I called there he would shew it to me : that I never did call to see such copy, and I did not find the original, and I never shewed the said Eli Van Allen either the original letter or a copy of it, but I believe the fact of the said Haskins having rented such house, and afterwards given it up, was mentioned at the interview in Mr. Mulligan's office, referred to in the third paragraph hereof, when my loss by delay was discussed.

" 5. That if the said Haskins gave any information to the said VanAllen on that subject, his doing so was entirely of his own accord and unasked by me."

The architect, Mulligan, was examined on Corby's behalf under an order made in the matter in Chambers, pursuant to sec. 222 of the Common Law Procedure Act, R. S. O. ch. 50. He said : " I do not think I ever gave VanAllen any information before he made his award to influence how he

should make up his award. * * My blank bill was gone through with, item by item, in presence of all parties. It was handed to Van Allen. * * I am unable to find it, though I have looked for it. * * Van Allen examined the work with the bill in his hand. * * One of the matters discussed in my office as being a matter to be disposed of by Van Allen, was the question (*sic*) to be allowed for loss of time in the completion of the contract.

Cross-examined— * * Everything that was in the bill that the parties did not agree upon was to be the subject of reference, in addition to the charge for time. At the time of the reference the question of damages for loss of time was in the contemplation of the parties to be referred. It was spoken of by both. * * They came by appointment to deal with the subject of reference. Corby had, prior to this, complained to me of the loss by reason of the delay. I had not certified about the delay. Corby wanted me to take something off. * * At the arbitration Corby advanced a claim for delay, but not in writing. No claim in writing for damages for delay was furnished to Van Allen. At the time Van Allen undertook his duty as arbitrator it was a question of discussion about his right to consider the question of loss of time. Cruickshank objected to it. * * I think it was spoken of on the day of the arbitration what day the buildings should under the contract be completed. I think it was Corby made the remark. Corby furnished me with a written statement of his claim for delay. It was before the arbitration meeting. I think it was among the papers in my office before the arbitration. I don't think I handed it to Van Allen. Do not think Van Allen spoke to me about the loss for delay before he made his award. * * I supposed he would get his knowledge from the practical knowledge of the business. * * Cruickshank did object at one time at the meeting to arrange on a reference to leaving Corby's claim for damages to arbitration. I do not know if he afterwards, and before the reference was signed, consented that this claim should be referred.

Re-examined— * * I assumed he waived his objection, because he signed the reference. I do not think he continued his objections up to the time of signing. I don't think I urged the question to be referred when the reference was signed, but I suggested it. The question about time was discussed between Van Allen and the parties at the meeting in my office, and I do not think it was objected to then. * * I understood it was left to Van Allen to deal with the question."

In his affidavit subsequently made, sworn on the 17th of November, 1879, Mulligan swore that the statement given by him to Van Allen, and which appears then to have been discovered, contained all the matters agreed to be left to arbitration.

The arbitrator made a further affidavit, sworn on the 27th September, to which the statement referred to in his former affidavit was annexed.

This statement differed in some particulars from the statement furnished to Cruickshank as a copy of the one in Mulligan's book, and on the last sheet was written, in a different hand-writing from the rest, the following memorandum: "Things to be taken into consideration. * * * The contract expired September 25th, 1878; buildings not finished until a long while after; mason completed upon their contract time. Take into consideration the present state of woodwork, painting, &c." And in pencil, "Penalty \$5 per day; time three months; extra to be allowed on time; *architect says* three months behind time."

In reply, Cruickshank made a further affidavit, in which he denied that he had ever admitted that he was three months behind time, or assented to the arbitrator entertaining the question of delay.

William L. Haskins deposed:

"1. That on one occasion, the month I cannot fix, Lewis R. Corby hailed me on the street in the City of Hamilton, and asked me if I had a copy of the letter, or a letter which I understood to be a certain letter, dated the 28th

of November last, written by me to him respecting one of the houses in question in this arbitration, and if I could give him the date thereof. I cannot remember my reply to him, but I asked him what was the difficulty, and he told me he had some trouble with the builder.

"2. That afterwards, I think on Good Friday of the year 1879, happening to go through the new Court House being erected in the City of Hamilton, I saw Mr. VanAllen, the arbitrator herein. When I saw him he had before him the plan of the houses in question herein, and had also a specification before him which he was examining; but I cannot say whether these were the specifications relating to said plan. To the best of my recollection at that time the said VanAllen told me that there was an arbitration pending between said Corby and Cruickshank about these houses, and that he was arbitrator: that the matter of my having rented one of the said houses was spoken of. I cannot say whether said VanAllen asked me about it, or whether I volunteered the statement as to my not taking the house which I rented, and I gave him to understand that I could not wait until they were finished as there was so much delay, I having waited until some time after the houses were to be finished as Corby gave me to understand.

"3. That from the conversation with said VanAllen he appeared to either have seen the letter of which Corby spoke to me, or had been fully informed of its contents, and he appeared to be perfectly conversant with the facts of my having rented the house, and of having refused afterwards to take it owing to the delay in completing it."

Upon this evidence I should, I think, come to the conclusion, if it was necessary to do so, that Cruickshank never did in fact agree to refer the question of Corby's claim for delay in completion of the work. It is not in terms referred by the submission, and it appears from the architect's evidence, that it had not been assented to up to the time of the appointment of the arbitrator. If it had been agreed to afterwards, I should have expected to find,

what however is entirely wanting, clear, distinct, and positive evidence to that effect, in the examination of the architect. The difference in the value of affidavit and *viva voce* evidence is here very well marked. The omission of any denial in the arbitrator's affidavit of the statement made in the last paragraph of Allen's affidavit is, to my mind, very significant.

But upon another ground it is plain that the award cannot be allowed to stand. It appears that the arbitrator permitted one Haskins to converse with him, and give him information upon the subject in dispute. It does not appear from any of the affidavits that the information, which, according to his own admission, the arbitrator derived from Haskins, was given to him on any occasion when the parties were present. Corby, it is true, says "he believes the fact of Haskins having rented the house, and afterwards given it up, was mentioned at the interview in Mulligan's office," but in the absence of any confirmation of this statement by the arbitrator or by Mulligan, I am not disposed to attach any weight to it. The arbitrator does not deny, even if his doing so would be of any avail, that the information so given him by Haskins had any effect upon his decision. He should not have permitted Haskins to converse with him upon the subject at all; or, finding that he had inadvertently done so, should have communicated the fact and the information received to the parties.

I do not think it is possible to treat what passed between Haskins and the arbitrator, as mere idle conversation. The interview occurred at the very time when the latter was considering the matters referred, and the information not only bore directly upon the question of Corby's loss by delay, but was given by a person who, as the arbitrator could hardly fail to suppose, was most likely to speak with a knowledge of the subject.

In *Boyle v. Humphrey*, 1 P. R. 187, the late Chief Justice McLean said: "If they," the arbitrators who made the award, "had been informed of the substance of Benedict's statement, so that it could by possibility be supposed

to have influenced their judgment, I should have felt bound to set aside the award, even had it been sworn that in fact it did not influence their decision; because in such cases it is almost impossible to say with any certainty that the minds of parties cognizant of certain facts sworn to may not to some extent be guided and governed by them."

In *Dobson v. Groves*, 6 Q. B. 637, Lord Denman said, at p. 648: "When once the case is brought within the general principle by a possibility that the arbitrator's mind may have been biassed, there is a sufficient objection."

Waters v. Daley, 2 P. R. 202, and *McEdward v. Gordon*, 12 Grant 333, are to the same effect. In the latter case the Chancellor refers to *Walker v. Frobisher*, 6 Ves. 70, a case where the arbitrator had heard statements relative to the matters in dispute in the absence of one of the parties, Lord Eldon, said: "It does not appear, that he afterwards held any conversation with the other party, or disclosed what passed to him, but the arbitrator swears it had no effect upon his award. I believe him. He is a most respectable man. But I cannot, from respect for any man do that which I cannot reconcile to general principles. A Judge must not take upon himself to say whether evidence improperly admitted had or had not an effect upon his mind. The award may have done perfect justice: but upon general principles it cannot be supported."

The interview between the arbitrator and Corby, as admitted by both of them, is also open to very grave objections, if the fact be, as affirmed by them and by Mulligan, that the arbitrator was to deal with all the matters set down in the statement prepared by the former. On looking at that statement it will be seen that there is a direction to "take into consideration the present state of the wood-work, painting," &c., the very thing pointed out to the arbitrator by Corby at the interview complained of.

I think the award should be set aside.

The rule will be absolute to set aside the award, with costs.

Rule absolute.

PALMER V. SOLMES.

Slander—Charge of incest—Special damage.

In an action for oral slander the words spoken imputed to the plaintiff that he had committed incest and adultery with his daughter, and alleged as grounds of special damage the loss of the society of friends, and illness and expenses consequent thereon :

Held, that the words were not actionable without proof of special damage, incest not being a crime cognizable in our Courts ; and that the special damage alleged here was insufficient.

DEMURRER.

Declaration : For that the defendant falsely and maliciously spoke and published of the plaintiff the words following, that is to say : "that he, the plaintiff, cohabited with his daughter," meaning thereby Franky Palmer, wife of Dr. William Jones Palmer, "the same as man and wife," meaning thereby that the said plaintiff had had criminal intercourse, and incestuous criminal intercourse, with his said daughter, and had committed adultery and incest with his said daughter; whereby the plaintiff was and is greatly injured in his good name, fame, credit, and reputation, and brought into public scandal and disgrace, and hath been and is shunned and avoided by divers persons, and hath lost the society of friends and neighbours, who refuse to and do not associate with him as they otherwise would do, whereby illness of body, and great pain of mind, and injury to his feelings, have been caused by the said slanderous words, and whereby he hath been put to and incurred great loss and expense in procuring and paying for medicines and medical attendance in and about curing himself of said illness, and has been otherwise injured.

The defendant demurred, on the grounds :

1. The said declaration shews no cause of action.
2. The alleged slanderous words do not charge an indictable offence, nor are they shewn to have caused to the plaintiff such particular or special damage as will support an action.

On January 9, 1880, the demurrer was argued.

Clute, (Belleville,) for the defendant. The crime charged in the declaration namely, incest, is not a criminal offence, and is not actionable *per se*: *Green v. Campbell*, 6 C. P. 50; and therefore special damage must be alleged and proved. The cases shew that while the loss of hospitality may be sufficient, because there may be pecuniary damage, namely, the loss of meat and drink, the special damage alleged here, the loss of the society of friends and by illness, is clearly insufficient: *Moore v. Meagher*, 1 *Taunt.* 39; *Allsop v. Allsop*, 5 H. & N. 534; *Roberts v. Roberts*, 5 B. & S. 384; *Lynch v. Knight*, 9 H. L. 577; *Davies v. Solomon*, L. R. 7 Q. B. 112; *Campbell v. Campbell*, 25 C. P. 368.

McMichael, Q. C. contra. The special damage alleged here is sufficient. The cases do not decide that the loss of the society of friends does not constitute sufficient special damage, but the point is still open. Illness and the expenses caused thereby also constitute sufficient damage: *Davies v. Solomon*, L. R. 7 Q. B. 112; *Riding v. Smith*, L. R. 1 Ex. D. 91; *Lynch v. Knight*, 9 H. L. 577; *Campbell v. Campbell*, 25 C. P. 368.

February 6, 1880. OSLER, J.—The words charged in the declaration impute the crime of incest, a crime not cognizable in our Courts, and therefore not actionable without proof of special damage: *Green v. Campbell*, 6 C. P. 50.

The special damage alleged is, (1). That the plaintiff has been shunned and avoided by divers persons, and has lost the society of friends and neighbours, who refuse to and do not associate with him as they otherwise would do, whereby illness of body and great pain of mind and injury to his feelings have been caused; and (2). That he has been put to and incurred great loss and expense in procuring and paying for medicines and medical attendance in and about curing himself of the said illness.

None of this is sufficient special damage to make the words actionable. As to the first head, the loss of consor-

tium vicinorum, that will not do, because, as has been said, the most capricious motives may deprive a man of it, and it was so held in *Mason v. Meagher*, 1 Taunt 39, approved of in *Lynch v. Knight*, 9 H. L. 577, and admitted by counsel and assumed by the Court in *Roberts v. Roberts*, 5 B. & S. 384.

There is a clear distinction, as Mr. Clute pointed out, between loss of hospitality and loss of the society of friends, the former importing, which the latter does not, a temporal damage, of which the law will take notice. See *Moore v. Meagher*, 1 Taunt: 39, where both were laid as grounds of special damage, and the declaration was expressly upheld on the former ground: *Davies v. Solomon*, L. R. 7 Q. B. 112. And even where loss of hospitality is laid as special damage, the names of the friends of whose hospitality the plaintiff has been deprived, must be set forth in the declaration.

As to the second head of special damage, viz., illness and expense consequent thereon, the case of *Allsop v. Allsop*, 5 H. & N. 534, also approved of in *Lynch v. Knight*, 9 H. L. 577, is an express authority that it is not sufficient. It is not the natural and necessary consequence of the words spoken.

Pollock, C. B., says: "The law deals with damage which might reasonably result, not with that which may depend upon the idiosyncrasy of the party. * * This particular damage depends on the temperament of the party affected, and it may be laid down that illness arising from the excitement which the slanderous language may produce is not that sort of damage which forms a ground of action."

There must be judgment for the defendant on the demurrer, but the plaintiff may have leave to apply in Chambers to amend, if anything can be proved amounting to legal special damage.

Judgment for defendant.

HILARY TERM, 43 VICTORIA, 1880.

*(From February 2nd to February 18th.)**Present:*

THE HON. ADAM WILSON, C. J.

" " THOMAS GALT, J.

" " FEATHERSTON OSLER, J.

HARRIS v. PRENTISS, ET AL.

PRENTISS v. PECK.

Statute of Limitations—Wild land—Notice to husband whether notice to wife—4 Wm. IV. ch. 1, secs. 17, 24, 27 & 28 Vic. ch. 29, sec. 3, construction of.

In 1823, adverse possession was taken of land by trespassers while in a state of nature, without any notice or knowledge thereof to the owners, several tenants in common claiming under the grantees of the Crown. In 1842 the husband of one of such tenants seized in right of his wife, usurping the rights of the other tenants, made leases of the whole land to the trespassers.

Held, that the knowledge acquired by the husband when he gave the leases, of the possession of the trespassers, was the knowledge of his wife, under 4 Wm. IV. ch. 1, sec. 17, so as to prevent her or those claiming under her from setting up the protection afforded by that statute to the owner of lands so taken possession of; and therefore on the determination of the leases in 1853, when the right of entry accrued, the Statute of Limitations commenced to run against her, and the title of the plaintiff claiming under her was barred by a twenty years' subsequent possession.

Held, also, that under sec. 24, the leases so made by the husband were made in his separate right to the exclusion of the other co-tenants, and not for their benefit.

Held, also, that the Act of 1864, 27 & 28 Vic. ch. 29, sec. 3, making forty years an absolute bar, even as against grantees of wild lands taken possession of which in state of nature without their knowledge, applies to cases arising before as well as after the passing of the Act.

THE first case was ejectment for lot No. 9, in the 1st concession of the township of Lansdowne.

The plaintiff claimed title by indenture, dated the 27th of March, 1876, from James Montgomery and George Denham to him.

The defendants, substituted for the original defendants, besides denying the plaintiff's title, asserted title in themselves, by length of possession in themselves and those through whom they claimed.

And the defendant Lucretia H. Prentiss asserted title to the lands in herself under a devise of the land contained in the last will and testament of Guy R. Prentiss, deceased.

And the defendant John Mudie asserted title in himself under a conveyance of the land to him from Alexander James Ross, Sophia Barbara Ross, Annie Elizabeth Ross, and Mary Ann Rosie Ross, dated the 18th of April, 1878.

In the second case, a bill was filed in Chancery by Lucretia H. Prentiss against Nelson Peck, which was transferred to this Court.

It set forth that the plaintiff was, at the time of the acts complained of, and had been since, up to the filing of this bill, owner in fee simple and in possession of the west half of lot No. 9, in the 1st concession of the township of Lansdowne, under the last will and testament of Guy R. Prentiss, deceased: that the said defendant had, from the 7th of October, 1878, trespassed upon the land, by entering thereon and ploughing up the soil, and interfering with the plaintiff's servants and agents, who were in possession of the land; and that the defendant had removed the division fence between the east and west halves of the said lot, and carried away the same and converted them to his own use; and that he continued and threatened, and intended to continue, to trespass on the west half of the lot in like manner, although he had been requested by the plaintiff to desist therefrom.

And the plaintiff prayed:

1. That the defendant be restrained by the order of the said Court from committing the acts aforesaid, and other acts of a like nature, and from disturbing in any way the plaintiff's possession of the said land.

2. That the defendant be ordered to restore to its former position the said line fence so removed by him.

3. That the plaintiff may have such further relief as the nature of the case may require.

The defendant answered as follows :

1. The admissions hereafter made are made for the purposes of this suit only.

2. I admit that I have entered upon the land in the bill mentioned, and ploughed the soil of part thereof, but I say that no other person was in possession thereof, and I did not interfere with any other person in so doing ; and I say that I did so as the tenant of one Edward William Harris, who was then the owner of an undivided interest in the said land, and that I have not interfered with or committed any acts upon the said land otherwise than in the course of good husbandry thereon, the same being farm property.

Issue was joined on the said answer.

The two causes came on to be tried at the last Fall Assizes, at Kingston, before Patterson, J. A., without a jury.

A good deal of evidence was given, chiefly for the purpose of establishing a title by length of possession.

The learned Judge found the paper title to shew a good title to four-fifths of the land in question in the plaintiff and the other one-fifth in the defendant Lucretia H. Prentiss.

The following is nearly a *verbatim* copy of the judgment of the learned Judge :

"The land, with other lands, was granted by the Crown, in 1798, to Henry Hay, Richard Hay, Elizabeth Hay, and Egathe Montigny, as tenants in common. The one-fifth of Elizabeth Hay was conveyed, in 1850, by her heir-at-law to Douglas Prentiss, [by a deed which professed to convey three-fifths, it being erroneously supposed that the grantor had the right to the three-fifths]. This is the one-fifth which is vested in Lucretia H. Prentiss. The two-fifths of Richard Hay and Henry Hay were conveyed, in 1804, to William Robertson, and by him conveyed

in 1823, to trustees for Elizabeth Lucy Robertson, who married Henry Ronalds, and by the trustees for the time being to the plaintiff on the 27th of March, 1876. The two-fifths of John Hay and Egate Montigny were conveyed in 1806 to Patrick Robertson and David Davids, as tenants in common. Patrick Robertson's one-fifth devolved upon Elizabeth Robertson, who married Sir James Stuart. She died in 1849. Sir James lived until 1853. Their only child, and the heir-at-law of Elizabeth, was Sir Charles James Stuart. David Davids' one-fifth he held till his death, and his devisees held it from thence until 1857. On the second of May, 1857, a partition was made amongst the then tenants in common, and under a deed of that date the one-fifth of Sir Charles James Stuart and the one-fifth which had been held by David Davids were conveyed to the trustees of Mrs. Ronalds, who had been Elizabeth Lucy Robertson, and in whom the other two-fifths, as before mentioned, were vested. And afterwards these four-fifths were conveyed by deed of the 27th of March, 1876, to the plaintiff. I understand the lot to run from the concession line to the St. Lawrence; but all parties seem to have considered it as running only to Landon's bay, an inlet from the St. Lawrence, which bay runs across the lot some distance north of the St. Lawrence. The lot immediately north of the bay consists of barren rock, running back, for a distance not definitely described, to what has been called the ridge or ledge of rock. That tract has not, unless perhaps recently, been enclosed or actually occupied in any permanent manner. The lot, near the north, is crossed obliquely by the travelled road, which cuts off a few acres lying between that road and the concession line. This part has unquestionably been cleared and occupied for more than forty years before suit, and is therefore unquestionably out of the plaintiff.

"The question is practically confined to the part between the travelled road to the north, and Landon's bay to the south. William Landon occupied the west half, or some

part of it, for more than forty years before action. His son Hiram succeeded him, and he sold to Prentiss. William Robinson occupied the east half, or some part of it, for more than forty years before action. His son James succeeded him, and sold to Prentiss.

"The extent and character of the possession of these people are the matters for decision. Douglas Prentiss, supposing he owned three-fifths of the lot under the conveyance he had, obtained deeds from the occupants, and made leases under which his tenants held from 1858 or 1859, both years being within twenty years of the bringing of this action.

"I have no doubt Prentiss must be held to have had possession of the whole lot as far, at all events, south as Landon's bay, that is, of the whole of the parcel which is now in dispute. In 1843 Sir James Stuart, who was then entitled in right of his wife to one undivided fifth part, made leases to Landon and Robinson of the east and west halves respectively. They remained in possession under these leases; but seem not to have paid any rent, except rent received in 1851 in a suit against Robinson. There can be no doubt that Sir James Stuart would have been barred as to his share if he had lived and had not done any other act, or had not received any further rent; but he died in 1853. He had been tenant by the courtesy from 1849, and in 1843, when he is first shewn to have had notice of the occupation of the land, he was entitled as against his wife to the possession as tenant by the courtesy initiate.

"There is therefore a question whether, assuming him to have communicated to her the fact of the occupation of the land, which I take to be a reasonable presumption, was she then *entitled to the land* within the meaning of the statute, so as to cause the twenty years limitation to apply to her.

"However this may be, and whether or not it may be held, as argued by Mr. Wallbridge, that the knowledge of one tenant in common binds all the co-owners, I think the fact must be found that from the date of the Stuart leases

the tenants had possession, for the purposes of the statute, of the whole of the land in dispute. Their possession was at first, that is, immediately after taking the leases, the possession of Sir James Stuart, and adverse to all the co-owners of the other four-fifths of the land.

"I apprehend the effect to be the same as if one co-tenant, Sir James Stuart in this instance, took actual possession of the entire estate, and that the possession for twenty years would enure to his benefit as against the owners of the other undivided portions, as such possession would have enured to Sir James Stuart if he had held possession himself, and that it would give him the fee unless the statute requires that his co-tenants should have notice of his possession.

"Against the necessity for notice it is further to be considered, that although none of the others had taken actual possession of the land by residing upon or cultivating any portion of it, yet when Sir James Stuart, by his tenants, took possession the land was not in a state of nature.

"Without assuming at present to decide the effect of the possession, which requires further argument and consideration, I think my proper course is to enter a verdict for the defendants as to four undivided fifths, thus leaving the possession undisturbed till the question of law is decided against it.

"As to the other one-fifth, I doubt if time ran at all against Lady Stuart in her lifetime, because she was not entitled to possession in 1843. I have not been referred to any authority which seems to decide that a right of entry accrues to a *feme covert* when her husband and not herself is the person entitled to recover.

"On the authority of *Doe dem. Corbyn v. Bramston*, 3 A. & E. 63, it would have to be held that forty years would bar her, but that decision is put on the ground of continuance of disability during the whole time, Lord Denman using language which intimates that short of the forty years the wife or her heir could not be barred by a possession which began while the husband was tenant by

the courtesy, meaning, as I understand it, tenant by the courtesy initiate, as he was discussing the case of husband and wife being both alive.

" If the statute did not begin to run in 1843 against Lady Stuart, then it did not begin to run until 1853 against her heir, Sir Charles, and no notice of the possession is brought home to him, unless it ought to be inferred that he knew of the occupation by his father, until within twenty years.

" I am of opinion, however, that the question of notice is inapplicable in his case, because his ancestress or his father in her right had taken actual possession.

" Therefore, as over twenty years from 1853 had elapsed before suit, I enter a verdict for the defendants as to this one-fifth also.

" I have, however, to find on the question of the forty years' possession, in case it becomes material.

" The action was commenced on the 30th of June, 1876. The limitation of the forty years must include the whole of the period up to the 30th of June, 1836.

" From the best opinion I can form from the evidence, I find that at the last mentioned date Landon had cleared or enclosed, and had in his actual occupation, about fifteen acres south of the travelled road, and that Robinson had in similar occupation about thirty acres south of the road, and that there has been continuous possession of these portions of the lot.

" I find that possession was taken by Landon and Robinson of the west and east halves respectively, or of the portions they actually occupied, with the intention on their part of taking possession of the whole as far south as the bay: that they were recognized by the owners or occupants of the adjoining lots as having possession of the whole, and they exercised such acts of ownership as would ordinarily be exercised by owners of similar lands, by cutting wood, preventing trespasses, &c., but without continuously occupying more than the smaller portions enclosed and cleared; and I think the inference warranted that when Sir James

Stuart came in 1843 and gave the leases, he recognized them as being, and as having been before that time, in possession of the whole lot.

"I should also note that, apart from the question of constructive possession, I find that there was actual possession for over twenty years before suit as far south as the ridge of rock."

Upon this the verdict was entered for the defendants.

In Michaelmas Term, December 5, 1879, *Bethune*, Q. C., obtained a rule calling on the defendants to shew cause why the verdict should not be set aside, and a verdict entered for the plaintiff for four undivided fifth parts of the land in question, or such other portions thereof as the Court may determine, inasmuch as no bar by the Statute of Limitations was proved; or why a verdict should not be entered for the plaintiff for such part of the said land as was not in the actual occupation of others prior to the 30th of June, 1856, or the 30th of June, 1836.

In this term, February 11, 1880, *Wallbridge*, Q. C., and *G. M. Macdonald*, shewed cause. There was possession taken of the land in 1823, by Robinson of the east half of the lot, and by Landon of the west half, and they and their children kept possession until 1858, when Prentiss bought their right and took conveyances from them, and he and his tenants continued in possession until the bringing of this action on the 30th of June, 1876. If things had been just as stated, the plaintiff could have had no kind of claim to the land. But in 1842, Sir James Stuart, the husband of one of the tenants in common of the land, and as such owning one undivided fifth part of it, got the two occupants Robinson and Landon to accept from him each a lease for his respective half of the lot at a rent, but no rent was paid upon such lease by Landon, and Robinson did not pay rent after 1851. That act of his was notice to the two co-owners that the land was then, that is in 1842, in possession of, and cultivated by Robinson and Landon, and it was notice also of the same facts to Lady Stuart,

his wife, in whose right the one-fifth share was held, and in each case the co-owners were all barred by the statute. The question of notice must be determined by the original Act 4 Wm. IV. ch. 1, sec. 17, which enacted that notice to the grantee of the Crown, or his heirs or assigne, or some or one of them, should be sufficient to affect all, while the Consol. Stat. U. C. ch. 88, sec. 3, omits these words. They referred to the following cases: *Doe dem. Corbyn v. Bramston*, 3 A. & E. 63; *Jumpsen v. Pitchers*, 13 Sim. 327; *Dundas v. Johnston*, 24 U. C. R. 547; *Davis v. Henderson*, 29 U. C. R. 344; *Heyland v. Scott*, 19 C. P. 165; *Mulholland v. Conklin*, 22 C. P. 372; *Trickey v. Seeley*, 31 U. C. R. 214, 219.

Bethune Q.C., and *McGee*, contra. A husband seised in right of his wife, can maintain ejectment in his own name: *Doe ex dem. Peterson v. Cronk*, 5 U. C. R. 135; *Doe ex dem. Eborts v. Montreuil*, 6 U. C. R. 515. The husband may make a deed of his wife's land, which will be good, at any rate for the husband's life: *Doe ex dem. McDonald v. Twigg*, 5 U. C. R. 167; *Doe dem. Dibble v. Ten Eyck*, 7 U. C. R. 600. The leases therefore, which Sir James Stuart gave, were valid leases so far as his wife's rights and interest were concerned, but no further—they did not affect the right of the co-owners. The possession of 1823, and continued from that time, was not such a possession upon which the statute could operate. The parties did not live upon the land. They put in crops and took them off, any one trespassed on the lot who pleased, and no particular person had the possession or actual occupation, and for successive years it was assessed and treated as vacant land. If, however, there was a sufficient possession, it was only of a very small portion of the land, and not of anything like the whole of it. If the leases made by Sir James Stuart are to have operation as notice of the occupation of persons upon the land, such notice cannot be extended to the other co-owners, for whom he was not acting. If the Act of 1834 is relied upon, the Consol. Stat. U. C. ch. 88, sec. 3, amended it, and so notice to one could no longer be held to be notice to another

holding in common. The case of *Snyder v. Sponable*, 1 Hill, N. Y. 567, decides that notice in such a case to the husband is not notice to the wife. See also *Doe dem. Corbyn v. Bramston*, 3 A. & E. 63.

March 5, 1880. WILSON, C.J.—I agree with the finding of the learned Judge who tried the cause, that William Robinson took possession of the east half of the lot in question, and William Landon of the west half, in 1823, extending as far south as Landon's Bay. The land at that time was in a state of nature, and the grantees of the Crown had not, nor had any of them, nor had any one claiming from or under them, notice of the possession so taken of the land, until 1842 or 1843, when Sir James Stuart gave the leases to Robinson and Landon of their respective halves. That, of course, he had no power to do, because he had only one-fifth interest in the property. By that act, however, which protected his own interest, he usurped the rights of his co-owners, and it became his separate estate, to the exclusion of the others, under the Act which was then in force, 4 Wm. IV. ch. 1 sec. 24; *Culley v. Doe dem. Taylerson*, 11 A. & E. 1008.

It will be convenient to trace this act of leasing by Sir James Stuart to its legal result, so far as it affects his own one-fifth interest, and for this purpose Lady Stuart may be considered as having been seised in fee of the whole lot, in place of an undivided share of it. Was the effect of it the same upon Lady Stuart as it was upon himself? He certainly at that time had notice that Robinson and Landon were actually in possession of the land, and he confirmed them in their possession of it, as far as he could, by granting them leases of it. From that time he could not, nor could any one claiming from him, set up the protection afforded by the 4 Wm. IV. ch. 1, sec. 17; C. S. U. C. ch. 88, sec. 3; 27 & 28 Vic. ch. 29, sec. 1; R. S. O. ch. 108, sec. 5, sub-sec. 4, to grantees of the Crown and those claiming under them, which saved their rights from the ordinary term of prescription, when their lands have been

taken actual possession of while in a state of nature by some other person not claiming from them, and of which they had no knowledge. Provided such wrongful possession does not exceed the term of forty years, or twenty years, as the case may be, under the later statute. Does that knowledge of Sir James Stuart, the husband, who is seised jointly with his wife, in right of the wife, constitute, under the sections of the Acts last referred to, notice to the wife? The knowledge is to be that of the grantee of the Crown, or person claiming under him, of another being in possession, while "the grantee of the Crown, his heirs or assigns," ('or some or one of them,' by the 4 Wm. IV. ch. 1, sec. 17,) "by themselves, their servants, or agents, have not taken actual possession by residing upon or cultivating some portion thereof."

I am of opinion that the knowledge by the husband, seised in right of his wife, is a knowledge which will affect the wife. He had power to make leases, bring actions, and dispose of the property as he pleased for his own life, and the right of entry and occupation of course. There is no saving of disability in case of coverture by which notice to herself during marriage should be deemed not to be notice to her of the fact of occupation; and it appears to me that those who argue that notice to the husband in such a case is not notice to the wife, must go further, and contend that notice to the wife during coverture will not be binding on her if she survive her husband.

It would be a singular state of things that the husband should lease the lands for twenty years, and receive the rents, and when he then died, and the tenant remained at sufferance for thirty years longer, if the wife could then bring an action and recover, because the statutory number of years had not run against her, as the land was in a state of nature when her husband, who had a right to let it, and did let it, by reason that she had not personal knowledge that her husband, who had the whole control and management of it, had dealt with it as an estate in possession in right of her title.

If such a claim could be maintained it must equally be maintained although her husband had himself been in the actual possession of the land for his lifetime, so long as the wife had no knowledge of that fact. The possession of the husband was here the possession of and in respect of the wife's estate, and he had knowledge *while entitled to the land*, of its being in the possession of others.

When, therefore, the statute commenced to run against the husband it commenced, so far as notice is concerned, to run against the wife as well. When was it, then, that it began to run against the husband? No time had accrued against him up to the making of the leases in 1842 or 1843. Upon the making of the leases, and during their continuance, no time would operate against the reversion. The reversioner would have a new right, so long as his reversionary right as landlord by dispossession or discontinuance of the rents was not interfered with: *Doe dem. Davy v. Oxenham*, 7 M. & W. 131.

We have no evidence of the duration or terms of these leases: whether they were for one year or from year to year, or for five years, or for ten years, or for what other term. All we know is, that leases were given to Robinson and to Landon, and that about 1851 Robinson was sued for arrears of rent, which he paid, but to or for what period that was we have no information. Giving the utmost latitude to the leases, they certainly determined upon the death of Sir James Stuart, who gave them, which was in 1853, and upon his death the title in reversion of the heir-at-law, Sir Charles, accrued. From that time until the bringing of the action, on the 30th of June, 1876, there was no act done by the occupants recognizing the title of the heir-at-law of Lady Stuart, nor any act done by him in assertion of his rights excepting being in the neighbourhood about eight or ten years ago.

The facts then are, that Sir James Stuart was in possession in 1842, in right of his wife. She died in 1849, The estate of Sir James by courtesy continued until 1853, when he died. Sir Charles, the heir of his mother, suc-

ceeded as reversioner. He sold to the Ronalds' estate, in 1857.

By 25 Vic. ch. 20, absence from the Province was made no longer a saving of the rights of absentees. They were placed by it on the same footing, with regard to their rights and the prosecution of them, as if they had not been absentees. The right of entry and of action of Sir Charles accrued in 1853. The twenty years then elapsed in 1873, and this action was not brought until the 30th of June, 1876.

The plaintiff is therefore barred by the lapse of the prescriptive period as to that one-fifth share of Sir Charles James Stuart.

As to the remaining three-fifths which are in dispute, it appears plain that those who have and had the paper title are also barred by the lapse of the forty years. As respects these shares, possession adversely to the legal owner was taken in 1823, and held continuously as against them from that time until the present time, making a possession up to the commencement of this action of fifty-three years, and by the 27 & 28 Vic. ch. 29, forty years is an absolute bar in such a case.

The plaintiff has no answer to the claim by possession, excepting that the lease by Sir James Stuart, representing one of the tenants in common, was for the benefit of the other co-owners as well as for himself—but that cannot be maintained in the face of the statute; and excepting that the Act of 1864, making the forty years an absolute bar even as against the grantee of wild lands taken possession of while in a state of nature without the knowledge of the owner, does not apply in any case but from the passing of the Act; but that is also equally untenable.

In the ejectment suit the plaintiff has failed altogether. The *postea* must be delivered to the defendants.

In the trespass case, in which Lucretia Prentiss, one of the defendants in the ejectment suit, is plaintiff, the decree must be made in her favour, as she has succeeded in the

action of ejectment, and she will be entitled, as of course, to her full costs.

The plaintiffs' rule will therefore be discharged.

Rule discharged.

BENJAMIN CRANDALL V. GEORGE CRANDALL.

Malicious arrest—Proof of warrant and information—Date of acquittal—Statute of Limitations—Evidence—Excessive damages—Costs.

The first count of a declaration alleged that one K. falsely and maliciously and without reasonable or probable cause issued a warrant against plaintiff on a charge of fraud, &c., and that defendant falsely and maliciously and without reasonable or probable cause prosecuted the same, and caused the plaintiff to be arrested and imprisoned, alleging the trial and the acquittal of plaintiff and the termination of the proceedings. The second count alleged that defendant falsely and maliciously, &c., indicted the plaintiff on said charge, and caused him to be tried thereon, alleging as before his acquittal, &c.

Held. that under the first count the warrant under which plaintiff was arrested should have been produced, or evidence of a search and its loss, to enable secondary evidence of its contents to be given; but as such secondary evidence was given at the trial without objection an objection taken for the first time in the rule *nisi* was too late.

A similar objection taken in the rule *nisi* as to proof of the information, even if such proof were necessary, was for the same reason held to be too late.

Held, that under the second count proof of such documents was not necessary.

Held, also, that the plaintiff was not bound by the day of acquittal as stated in the record thereof, being the commission day of the Assizes, but might shew the actual day on which it took place.

Held, also, that the Statute of Limitations commenced to run from the date of acquittal, when the proceedings became terminated, before which the plaintiff had no right of action, and not from the date of arrest.

Held, also, that the evidence, set out below, was sufficient to connect defendant with the arrest and prosecution of the plaintiff, and to shew that he acted without reasonable and probable cause.

The Court was of opinion that the damages given, \$3000, were excessive, and directed, subject to the plaintiff's acceptance, that they be reduced to \$1000, absolutely, and to \$500 if such sum and the costs of the action were paid before 1st of June; but in the event of the plaintiff refusing to accept the proposed terms, then there should be a new trial on payment of costs by the defendant.

DECLARATION:

First count: That John Kerr falsely and maliciously, and without reasonable or probable cause, issued a warrant

against the plaintiff on a charge of fraud and obtaining money under false pretences, and the defendant falsely and maliciously, and without reasonable or probable cause, prosecuted the same, and by virtue of the said warrant caused the plaintiff to be arrested and imprisoned for a long time, &c., and to be put upon his trial, and the plaintiff was thereupon acquitted on the said charges, and was discharged out of custody, and the prosecution was wholly determined, whereby, &c.

Second count: That the defendant falsely and maliciously, and without reasonable or probable cause, indicted the plaintiff at the Court of, &c., for that the plaintiff had obtained, by false pretences and with intent to defraud, the signature of one John Kerr to two promissory notes, dated respectively the 19th of December, 1868, and falsely and maliciously, and without reasonable or probable cause, caused the plaintiff to be put upon his trial upon the said indictment, and the plaintiff was acquitted upon his said trial and discharged out of custody, and the prosecution was wholly determined, whereby, &c.

Pleas:

1. Not guilty.
2. That the causes of action did not accrue within six years.
3. That the proceedings were not determined.
4. To the first count: That the said John Kerr did not falsely and maliciously, and without reasonable or probable cause, issue the said warrant.

Issue:

The cause was tried before Morrison, J., and a jury, at Lindsay, at the Spring Assizes of 1879.

The evidence, excepting what is here given, sufficiently appears in the judgment of the Court.

The defendant wrote to the plaintiff as follows:

“Lindsay, April 4, 1877.

“Dear Brother Benjamin:

“I wish to inform you that Caleb has sued me on a note which I gave him in 1871 for the Duncan lot, being \$500. I think that I can shew that I paid the amount of the note:

however, it shews me what Caleb will do, if he has the chance. Now, I think that you had better institute an action against Caleb at once, say for \$5000, for false imprisonment, as your time will be outlawed in a very short time, say six years. Now is the time to make him feel his position. Besides this, have Mary to sue him for wages to the extent of \$100. * * * I can help you to succeed in your suit, and will go to trial any time to do so; besides, I can bring Howden, which will make it a clincher. I don't think it any wrong to go for him when he acts so bad to the family. * * * Go for him at once, and do not make any noise about it. Keep quiet in all you do.

(Signed), "GEORGE CRANDALL."

The agreement and declaration referred to in Howden's evidence were to the effect following:—

The agreement was dated the 14th of April, 1877, and was made between the plaintiff of the first part, and John Howden, the witness, of the second part, and it was duly signed and sealed by them. By it the plaintiff, for the consideration of \$10, assigned to the party of the second part an undivided half of his interest in a certain claim or action against Caleb Crandell, commenced about the 10th of the present month, at the suit of the plaintiff, each party being at half the expenses of the suit; the claim being in respect of the arrest of the plaintiff made by the said Howden.

The declaration was to the effect following:—John Howden, on the 15th of February, 1878, under the Act relating to voluntary and extra-judicial oaths, solemnly declared, conscientiously believing the same to be true, that in 1871 he went to Whitby at Caleb Crandell's request, who said he wanted to arrest Benjamin Crandell, and that he would not have Benjamin Crandell go to the Court House (where the sittings in Chancery were to be held) for \$100, and he offered him (Howden) \$100 to have the arrest made, and to take Benjamin away to Cobourg gaol: that he (Howden) took some \$30 from him at the time and made the arrest, and immediately took the said Benjamin Crandell away to the Cobourg gaol as a prisoner: that Caleb

Crandell requested him to remain at Cobourg, and to pay visits to the prisoner for the purpose of softening him to withdraw the land suit : that Caleb Crandell found Howden the funds by draft through the bank at Cobourg : that he (Howden) knew the arrest was a made job at the instance of Caleb Crandell, to prevent the prisoner giving evidence on the said trial : that he (Howden) would have allowed the prisoner to have given evidence, but Caleb would not allow it, and he (Howden) was acting under the positive instructions of Caleb Crandell, and was paid by him for his (Howden's) services.

The learned Judge said there was no direct evidence that the defendant directed Howden to make the arrest. He reviewed the evidence on that part of the case, and said if the jury was not satisfied the defendant promoted or caused the arrest, to find for the defendant ; but if they thought the defendant did so, to find for the plaintiff, with such damages as they thought right ; and if they thought he did so to prevent the plaintiff attending to his Chancery suit, they might give exemplary damages.

The defendant's counsel at the close of the case renewed the objections which he had taken before entering upon the defence.

The jury found a verdict for the plaintiff, with \$3,000 damages.

In Easter term, May 22, 1879, *H. Cameron*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered, pursuant to the leave reserved : or why a new trial should not be granted, on the grounds that there was no sufficient evidence to go to the jury to sustain an action on the case, as there was reasonable and probable cause for the arrest of the plaintiff proved ; and that the plaintiff's case was not sustained, because the information and warrant were not proved, and no secondary evidence or basis for it was given ; and that the Statute of Limitations applies, as the time commenced to run from the arrest of the plaintiff, and not from

the termination of the prosecution ; and, even if from the latter time, the statute equally applies, as the record of acquittal is conclusive evidence, and shews it to have taken place on the 14th of October, 1871, more than six years before the commencement of this suit ; and that there was no evidence to connect the defendant with the proceedings on the arrest, and, even if there were, there was probable cause shewn ; and because the verdict is against the evidence and unsupported by any evidence ; and the damages are excessive.

In Trinity term, August 28, 1879, *N. G. Bigelow* shewed cause. The Statute of Limitations is relied upon, and it is said to be a bar because the record of acquittal shews the now plaintiff was tried and acquitted by a jury, upon the 14th of October, 1871, while the action was not brought until the 31st of October, 1877. But the plaintiff is not bound by the day stated in the record, he is at liberty to shew the exact day during the sitting of that Court upon which the trial and acquittal took place : *Whitaker v. Wisbey*, 12 C. B. 44, 56-57. And as a fact, it took place upon the 4th November, 1871, and so this action was commenced before the expiration of six years from that latter date. It was contended at the trial that the six years began to run at and from the time of the arrest, and the defendant relies upon it also in his rule. That is not so, because the plaintiff's cause of action was not complete until the termination of the criminal proceedings. The defendant is liable upon the second count if he acted maliciously, &c., although Kerr might have been justified in the proceedings anterior to the indictment, and also upon the first count if he acted maliciously, &c., in what he did in procuring the arrest of the plaintiff upon the magistrate's warrant, and in taking the subsequent proceedings against him, although Kerr might have been justified in laying the information and in issuing the warrant against the plaintiff. There is no evidence that the defendant had reasonable and probable cause for what he did. It is not shewn that he knew any of the facts or circumstances upon and under which Kerr acted,

and there was no evidence given of the charge against the plaintiff being actually true: *Delegall v. Highley*, 3 B. & C. 950. The defendant says the information and warrant were not proved, and no secondary evidence was given of them, or any basis made for such evidence. The evidence of the plaintiff shews he made enquiry for the warrant on which he was arrested, and he could not find it, and so secondary evidence was received of it. The defendant was the person who took the proceedings against the plaintiff. He procured Howden to arrest the plaintiff, and to take him to Cobourg gaol. He had threatened to send the plaintiff, before the arrest, to the penitentiary if he did not give up his Chancery suit. He made these threats again to the plaintiff while he was in gaol, and he tried to get Douglass to execute the warrant which he had, but he would not do it, for the purpose of stopping the Chancery suit. The arrest too was on the very morning of the Court, when the defendant was also present. It was said the defendant wanted Howden to allow the plaintiff to give evidence in the cause before taking him from Whitby, but Howden would not do it. The jury did not believe that, for there was no reason why it could not have been done without prejudice to the constable. The damages may seem large, but the defendant's conduct must be considered in the transaction. He acted maliciously and illegally: he was abusing the process of the law: he wanted to hinder the plaintiff from procuring his legal rights. He induced him to prosecute their brother Caleb, alleging that he was answerable for the arrest and imprisonment; and he himself called it a false imprisonment. The amount under the facts was not too large.

Maclennan, Q.C., contra. There was not a particle of evidence to support the case at the trial. There was no warrant produced on which the arrest was made: nor evidence given to let in secondary evidence of it: nor proper secondary evidence: nor was the information produced, or its absence accounted for. It was not shewn the defendant had any part whatever in the arrest: on the

contrary, he asked the constable to allow the plaintiff, while at Whitby, to give evidence in the Chancery suit before removing him to Cobourg, and he retained counsel to defend the plaintiff against the charge. And even if the defendant had procured the arrest and prosecution, there was no want of reasonable or probable cause shewn, nor malice. In no respect was a case made out, and the plaintiff should have been nonsuited. Douglass, who gave some evidence favourable to the plaintiff, still does not prove the case; for, although the defendant, as Douglass said, asked him to arrest the plaintiff on the warrant he held to prevent him from giving evidence in the Chancery case, Douglass did not do it. And what is of more importance for the defendant is the fact that Kerr, who laid the information and got the warrant to arrest the defendant, is the very person who appeared before the magistrates to support the charge he had made, and who appeared before the grand jury when they found a true bill against the plaintiff, and who appeared at both assizes to give evidence, and who was surprised when the acquittal took place without any evidence being offered for the Crown, although he was present ready to give it. That arrest and imprisonment cannot therefore in any respect be called an arrest and imprisonment caused and procured to be made by the defendant. The plaintiff's evidence shews no more than means taken by the defendant, while the plaintiff was in custody, to abandon what the defendant considered to be a very unjust suit against their father; but such a course, although not right, will not make the defendant liable in this action. The plaintiff did not in 1877, when he sued Caleb Crandall, believe that the defendant had anything to do with the arrest; and nothing has happened since to make a change in matters between them; and then the object of the suit was to divide the money he might make out of Caleb with Howden, who was to prove the case against Caleb, not the defendant. The case, if one can be sustained, should have been in trespass, because Howden, who arrested, had no warrant. He could not have had it,

as Douglass had it all along until he produced it at the trial. If so, the bar was complete by four years and long before the action was begun. But even if the six years be allowed, the action was commenced after the limitation was complete. The six years must count from the date of the arrest, which was in November, 1870, and the writ was not sued out till the 31st of October, 1877: *Violett v. Sympson*, 8 E. & B. 344. The defendant's act, as alleged, was independently of the termination of the criminal proceedings, and for that cause also the six years are a bar. As to the damages, they are so very excessive under the facts of the case that a new trial it is conceived must be granted.

March 5, 1880. WILSON, C. J.—The objection as to the absence of the warrant on which the arrest was made should first be disposed of, because if the case fail there, nothing further need be considered.

The evidence is, that Howden was the constable who made the arrest of the plaintiff. The plaintiff said the warrant purported to be backed by the Mayor of Whitby. John Kerr, the complainant, said he laid an information against the plaintiff before Joseph Barnhart, J. P., in South Monaghan. He got the warrant issued and he gave it to Barnhart's son, and he understood the son gave it to Howden. Howden said he received the warrant under which the plaintiff was arrested from Barnhart (the magistrate who issued it, or it may be his son). He does not know where it is. He does not know whether he left it with the magistrate at Cobourg. He had made no search for the warrant. John Higgins said the plaintiff was in Cobourg gaol under the warrant produced, dated the 19th of November, 1870. Howden brought the plaintiff as prisoner and the remand to the gaol. The warrant or remand produced by Higgins was issued by George Stephens, J.P., at Cobourg. It recited that the plaintiff and Beardsley were on the 9th of November, 1869, charged before Joseph Barnhart, J. P., by John Kerr, with the offence before stated, and that it

appeared to the said Justice it was necessary to remand the plaintiff, and thereupon the remand was granted, that the plaintiff be taken to the gaol at Cobourg and kept until the 21st of November, then to be brought up again to answer to the said charge. The plaintiff was brought up before the magistrates two or three times before he was admitted to bail. John Kerr said he was at Cobourg before the Justices, and at the Assizes he went before the grand jury.

The original warrant issued by Barnhart was not proved by its production, nor was sufficient search made for it to let in secondary evidence of it, if it should have been produced or its absence sufficiently accounted for. Howden, who had it, did not search for it.

Was it necessary to produce it? That there was such a document is quite clear; and that Howden got it to execute, and that he arrested the plaintiff, and took him before the magistrate at Cobourg upon it, who issued the warrant or remand on which the plaintiff was taken to gaol, and that Kerr attended before the magistrates when the plaintiff was brought up on the hearing of the charge, are also facts which were proved at the trial.

It was necessary upon the first count to prove the warrant, because it is alleged therein that Kerr wrongly procured it to be issued, and that the defendant wrongly procured the plaintiff to be arrested upon it. But the warrant, if produced, would only have shewn that Barnhart issued it for the offence laid against the plaintiff in respect of the false pretences committed to the injury of Kerr: that such warrant was given to Howden; and that he arrested the plaintiff upon it, and took him to gaol.

Now all these facts appear in the evidence given at the trial. If the defendant suffered these facts to be brought out, he cannot afterwards object that the warrant itself was not produced. He should have stopped the evidence proposed to be given as to the contents of the warrant, or even as to its legal entity, until it was produced, or until the plaintiff had shewn its loss, or such other matter as would

entitle him to give secondary evidence of it. The defendant's witness, Howden, shewed that he "received the warrant from Barnhart, under which I arrested the plaintiff. Where it is I do not know. It was issued on complaint of Mr. Kerr." That was evidence suffered by the defendant to be got from his witness on cross-examination, although the witness had not then shewn he had made any search for the warrant.

It is too late now, in my opinion, to take this objection : *Robinson v. Davies*, L. R. 5 Q. B. D. 26.

It was also objected that the information was not proved which Kerr laid against the plaintiff, but he said what it was he charged the plaintiff with, telling all about it, and without objection taken to such evidence being given.

That objection came too late also.

Neither count alleges an information was laid by Kerr, and the chief object of proving it is usually to connect the person making it with the arrest which is complained of in the action for malicious prosecution.

If, however, it be alleged in the declaration that there was an information on oath, or in writing, the allegation must be proved, because such a statement shews it was in that way the defendant set the magistrate in motion : *Gregory v. Derby*, 8 C. & P. 749.

It is said it is not necessary to state that there was an information in the declaration, and that it would be sufficient merely to state the party procured the warrant to be issued : *Ib.* See also *Petrie v. Lamont*, 3 M. & G. 702.

If the plaintiff state only that the defendant charged the plaintiff with a certain offence and caused the magistrate to issue a warrant thereon, as in *Nourse v. Foster*, 21 U. C. R. 47, and as in this case, is it necessary the plaintiff should prove an information, if one is shewn to have been in fact laid and in writing, although not so averred in the declaration ?

In *Newsam v. Carr*, 2 Stark. 69, Wood, B., said, at p. 70 : "It did not appear that any information had been taken." But there the information, it was contended, should have

been produced to shew what the charge was, because the warrant was lost.

If the evidence had been insufficient as to these documents, we might have been obliged to allow evidence to be yet given, as these were merely technical and not substantial matters.

The second count certainly does not require proof of the information or warrant.

Another objection was that the cause of action was barred by the limitation of six years. The dates are: the acquittal was in fact on the 4th of November, 1871, and this suit was begun on the 31st of October, 1877, a few days before the expiry of the six years.

The defendant contended, that as the record of acquittal shewed that the Court at which the trial took place was held on the 14th of October, 1871, and the *venire facias* was that a jury thereupon immediately come, and that the jurors came, &c., who, after being duly called and sworn, said the plaintiff was not guilty: that it appeared the trial took place upon the 14th of October, 1871, or at some day at any rate six years before the day of the commencement of this suit. The plaintiff referred to *Whitaker v. Wisbey*, 12 C. B. 44, which shewed that the Assizes were considered to be but one day in law, and although it appeared by the record that the conviction was upon the commission day, it might nevertheless be shewn the conviction was in fact on a day posterior to the commission day. There the prisoner, after the commission day, and before his conviction, made for a good consideration and *bonâ fide* a conveyance of his goods, and it was desired to conclude the assignee from shewing that the conviction in truth took place on a day later than the commission day stated in the record. But the Court allowed the fact against the fiction to be shewn, and the assignment was upheld.

We think that is an answer to the defendant's objection.

It may be noted here, although nothing turns upon it, that the commission day was really the 30th of October, 1871, and not the 14th of October, 1871, as stated in the record.

The defendant then contended that the limitation must nevertheless be a defence in this cause, because the six years, if that be the proper time, must be computed from the date of the arrest, which would admittedly be a complete bar to the action; and he referred to *Violett v. Sympson*, 8 E. & B. 344, as an authority for that. It has really no application. The plaintiff in that case could have sued so soon as the defendant procured the order of the Court to be made against him. The plaintiff in this case could not have sued until the termination of the proceedings, for until then the prosecutor was carrying on the charge, and it was only upon the event of these proceedings being favourable for the plaintiff, that the plaintiff would acquire a cause of action. This cause of action did not accrue, because it was not complete until his acquittal. If the defendant's argument prevailed, the plaintiff would lose his right of action if the charge were by course of law delayed for six years after the arrest before it was finally ended, although during all that time the plaintiff could not have brought an action.

It was next urged that there was no evidence to connect the defendant with the arrest, or with the prosecution of the plaintiff.

The evidence relied upon was that the plaintiff had begun a Chancery suit against his father, which the defendant wished the plaintiff to abandon, and he would not. The defendant told the plaintiff, before the arrest, if he did not abandon the suit he, the defendant, would send him to the penitentiary.

The defendant wanted Douglass, who had also a warrant against the plaintiff on this same charge of Kerr's, to arrest the plaintiff, at Whitby, upon the warrant, to prevent the plaintiff from being a witness at the sittings of the Court of Chancery, soon to be held there, and he pressed Douglass to do so, saying he, Douglass, would be well paid for it. It may be inferred from the evidence that the defendant procured Sheehy to point out the plaintiff to Howden, who did not know him. The defendant said to the plaintiff,

while the latter was in gaol—and the deputy-gaoler testified to it—that if the plaintiff would settle the Chancery suit he, the defendant, would get the plaintiff out of gaol; and, if he did not, he the defendant, would send the plaintiff to the penitentiary. The defendant, in his letter to the plaintiff, of the 4th of April, 1877, desired the plaintiff to bring an action against [their brother Caleb, as the one who had procured the arrest, saying he, the defendant, could get Howden to prove the case for him, and that he, the defendant, would help him too; and that the plaintiff was to sue for a *false imprisonment*. It does not seem to have troubled the defendant then that such an action could not succeed, because Kerr was the real and active prosecutor. The arrest was made at Whitby, on the very day the Chancery suit was to be heard, the defendant being there, and having come purposely there on that day as interested in the suit no doubt, but, it may be inferred, also to see to the arrest. As a fact, by reason of the arrest, the plaintiff was prevented from giving evidence in the suit, which happened to be the very thing which Douglass said the defendant wanted to effect; and, so far as the arrest, imprisonment, and indictment were concerned, the plaintiff was put upon the right road for the penitentiary.

There was no doubt evidence for the defendant that he had nothing to do with the arrest or indictment: that Kerr was the actual prosecutor from first to last: that the defendant wanted the constable to allow the plaintiff to attend to his suit at Whitby before he was taken to gaol; and that he retained counsel to defend the plaintiff at the Assizes.

It was for the jury to say what reality or sincerity there was in the defendant's request to Howden at Whitby to permit the plaintiff to attend to his suit before being carried to gaol. He no doubt did not want the plaintiff to know or suspect that he, the defendant, had anything to do with his arrest; and the plaintiff does not seem to have known it, or suspected it, until after he had sued Caleb for it in 1877. It certainly could have been no object for

Howden to prevent the plaintiff from giving evidence in or from attending to the suit.

And as to the retaining of counsel by the defendant for the plaintiff upon his trial, it may have been he did so, and in good faith, as the Chancery suit had, by the arrest and imprisonment of the plaintiff, fallen through; and after that it may have been no longer an object of the defendant to send the plaintiff to the penitentiary. His purpose was answered, and he may really have desired an acquittal, under the new state of things, rather than a conviction, even if a conviction could have been secured.

As to Kerr's share in these proceedings, there is no doubt he laid the information and procured the warrant to arrest the plaintiff in November, 1869. Why he took no means to arrest him does not appear from the evidence on the trial, but as a fact he did nothing upon the warrant, nor against the plaintiff after the issue of the warrant, until the plaintiff was imprisoned and was brought before the magistrates for examination. On the former trial the evidence shewed what the reason for that remissness apparently was. After the imprisonment Kerr certainly does seem to have taken part in the prosecution; that is, he attended and gave evidence before the magistrates. He attended at the Assizes, and gave evidence before the grand jury when the bill was found; and he was at the Assizes when the case was called on, and he was ready to give evidence but the case was disposed of, but why it was so disposed of he does not know. There is also no evidence that the defendant personally had anything further to do with the prosecution after the plaintiff was imprisoned. After the proceedings were fairly started by the arrest and imprisonment they had to go on, and Kerr was a necessary witness.

And the question is, who was the person who put the law in motion against the plaintiff? Kerr did so by procuring the warrant. He was doing nothing upon it, and it is said the defendant took it up and gave the case such an impetus that Kerr had to lend himself to carry it on,

whether he liked it or not. Is that the case? It was for the jury upon the evidence to say; and they have said it was the defendant who got the warrant enforced and the true bill found against the plaintiff. And I cannot say upon the evidence they have wrongly found.

If, however, the defendant is considered to be the real prosecutor, and answerable for what he set going, it was said he was justified in all he is said to have done, because there was reasonable and probable cause for what he did.

In *Weston v. Beeman*, 27 L. J. N. S. Ex. 57, one Reed had issued the summons against the plaintiff on a charge of felony, and the defendant was sued for maliciously and without reasonable or probable cause prosecuting the charge. The plaintiff was brought up on the summons. The defendant did not know it had been taken out until after it was issued, and he attended at the hearing, when the magistrate dismissed the case. It was held that the mere fact of the defendant so attending, and not disclaiming the proceedings, but allowing the evidence to be proceeded with, was not evidence of malice nor of a want of reasonable cause for the share which he took in the proceedings, that is, allowing the case to go on to a hearing.

Bramwell, B., said in the case, at p. 59: "Now, the proceedings were not commenced by them," the defendants, "but only continued; and their responsibility commences at the point at which they became cognizant of the proceedings."

The Chief Baron concurred in that statement.

Moon v. Towers, 8 C. B. N. S. 611, shews that what the defendant did in the preceding case was not perhaps such an act which made him a party to the proceedings at all.

See also *Cotterell v. Jones*, 11 C. B. 713.

It is plain then, if authority were wanting, that the defendant may be sued for his share in a malicious prosecution, although he did not originate it; but then, of course, only for his own acts.

It follows, also, that while the one who began the charge may have been justified in what he did, and would have been justified if he had carried it on to the end, but not

successfully, that the other who carried it on may not be justified for his share of the prosecution. Each party is to be judged by the operation which the facts of the charge had upon his own mind at the time he took the proceedings, and the one who intervenes and takes up the prosecution cannot justify himself by the effect which certain facts had upon the mind of the other; he must defend himself by the effect which they had upon his own mind. He cannot assume to himself the rights of the other simply because the other did not in fact take the proceedings which the intervening party carried through, and cannot in any way be made responsible for them.

What then are the matters which it is said afforded reasonable and probable cause for the defendant? They are, that Kerr said he had purchased a one-sixteenth interest in a patent right to a brake from the plaintiff for \$1,000, and had given his notes for that sum: that he laid an information against the plaintiff for obtaining the notes under false pretences, as representing the brake was useful and new, and that a company was to be formed for selling and working it, and was to sell and manufacture before three months, when the notes would be due: that the company was to make money by selling rights. Another charge was, that the plaintiff was not the original inventor. Also, that he had on the paper subscribers who were not so. Bradburn's name was mentioned as one, when he was not so in fact. "I satisfied myself that the plaintiff was not entitled to have such a patent, and that the right was of no value."

And the plaintiff said: "I was engaged selling patent rights in the United States and Canada; and I was charged by one person with getting notes under false pretences in selling him one-sixteenth part of a patent right. In 1866 I sold rights, the Bennett patent, in the United States. I was selling rights here in 1868."

Then the patent is put in, which states the plaintiff to be "the original inventor and discoverer of a self-acting brake on the front wheels of a waggon that may be applied to all vehicles drawn by animals." The patent is dated the 23rd of March, 1867.

Under the statute then in force, Consol. Stat. C. ch. 34, a patent to one, as the inventor and discoverer, could be granted, who in his travels in a foreign country discovered or obtained knowledge of the alleged new machine, &c., not known or used in the province before the party's application for a patent: but such foreign machine, &c., could not be patented if the knowledge or discovery were obtained of it in the United States as a machine, &c., in use or made or discovered there: and the applicant for a patent of a machine, &c., discovered, or of which knowledge was obtained in a foreign country, had to state that fact, and also that such foreign country was not "one of the United States of America." Secs. 10 and 11.

The suggestion is, that this patent right was one which the plaintiff had been selling in the United States in 1866, and that his patent therefore was a fraud and valueless, but there is not a word of proof of that as a fact, excepting what Kerr says: "I satisfied myself that the plaintiff was not entitled to have such a patent, and the right was of no value;" and, excepting that he charged the plaintiff with having obtained the notes from him for \$1,000 for the one-sixteenth interest by false pretences, upon and in respect of such a right.

If Kerr satisfied himself that the plaintiff was not entitled to have such a patent, he certainly did not shew by his evidence how, or in what manner and by what means he did so. Upon such evidence it is impossible he could have satisfied the jury of the same fact.

But if Kerr had satisfied himself that the patent was of no value, the defendant cannot take advantage of Kerr's knowledge and satisfaction of mind for what he the defendant did, which Kerr did not do.

The defendant himself said: "I knew nothing about the matter in the information laid when I was in Whitby." That was at the time of the arrest. If he did not know anything about the matter, what right had he to arrest or prosecute, or to interfere at all? The person making the complaint cannot shew he acquired a knowledge of facts.

afterwards. In order to make out reasonable and probable cause, he must shew he had such knowledge at the time he complained : *Brooks v. Blain*, 39 L. J. N. S. C. P. 1.

It is important to know what it was that operated on the mind of the party, at the time he swore to the charge, and how his mind was affected or influenced at that time : *Shrosbery v. Osmaston*, 37 L. T. N. S. 792.

In this case I can see no pretence for saying the defendant had any reasonable or probable cause for doing anything which it is said he did, nor do I see any such evidence on this trial even in Kerr's favour.

In my opinion the plaintiff's case has been proved.

Then we have to consider the damages. And as to them, I think they are very large. The plaintiff and defendant have each, on their own evidence, been in the penitentiary.

In Harrington's tavern, while disputing, in 1870, about the Chancery suit, each threatened to send the other to the penitentiary. The plaintiff was charged with obtaining money by false pretences on an occasion before Kerr made his complaint, and Beardsley with him, in respect of the same patent right, and he and Beardsley absconded from the province, and, as the defendant said, he sent them away to prevent them from being arrested. The plaintiff made a most corrupt bargain with Howden, the constable, to divide whatever the plaintiff could make out of the suit which he brought against his brother Caleb, charging him as the person who had procured him to be arrested ; and the defendant induced the plaintiff to sue Caleb, because Caleb was suing the defendant on a note for \$500, and the defendant promised the plaintiff to help him in that suit, and to get Howden also to help him. Howden's evidence was to be a *clincher*. Which of them it was got Howden to make the affidavit against Caleb does not appear. Mr. Bigelow said it was procured by the defendant. Probably that it is so, as it was made in February, 1878, several months after this action was brought, and it is not likely that the plaintiff would have it made, because it would defeat the very action he had

brought. The affidavit, Howden himself said at the trial, was not true, and it was not pretended to be supported as true at the trial. This action, it must be remembered, also has been brought within a very few days of the expiration of the period of limitation of six years from the termination of the prosecution. Under all these circumstances, the damages might very well have been limited to a sum much below the \$3,000, which was given. The reason, no doubt, so large a sum was given, notwithstanding these damaging facts against the plaintiff, is the bad purpose the defendant had of stifling the Chancery suit of the plaintiff by the summary method of shutting him up in gaol, and doing what he could to send him to the penitentiary, by a very flagrant abuse of the process of the law ; and in that case, however much may be urged to the disadvantage of the plaintiff, it is in no way surprising the jury should have lost sight of his merits, and looked only to the wrongs inflicted upon him by the very harsh and unjustifiable practices of the defendant. Still, I do think too large an estimate has been made.

My learned brothers and myself are of opinion the verdict should be absolutely reduced to \$1,000, and if the defendant pays \$500 and the costs of the action by the first of June, the verdict will be further reduced to the sum of \$500, and the payment of the said sum and costs will be in full of the said verdict and costs. If payment be not made the verdict will stand at \$1,000. If these terms are not agreed to by the plaintiff, the rule will be absolute for a new trial on payment of costs by the defendant.

Rule accordingly.

LONG ET AL. V. ANDERSON.

Patent from Crown—Construction of—Fee simple—Statute of uses.

By a patent from the Crown, after a recital of one J. L. having contracted for the purchase of certain land from the Crown Lands Department at a price specified, the land, in consideration of the payment of said sum by J. L., was granted "to the said J. L. upon the conditions below stated," &c.: "To have and to hold to the said J. L., for the use and benefit of herself and children, Margaret, Robert, and Mary, their heirs and assigns for ever. And also to have and to hold the said parcel or tract of land hereby granted," &c., "unto the said J. L., upon the conditions above stated, her heirs and assigns for ever."

Held, that in order to carry out the intent of the Crown, the second *habendum* must be transposed, and read as the first, and thereby a fee simple under the Statute of Uses was created in J. L. and her three children named, as the grantees of the first use declared.

EJECTMENT for the east half of lot No. 28 in the 6th concession, south of the Egremont road, in the township of Warwick.

The plaintiffs, Robert Long, Margaret Kirklaw, James Goodwin, and Mary Goodwin, claimed by grant from the Crown to Jane Long, Margaret Long, Robert Long, and Mary Long.

The defendant, besides denying the title of the claimants, asserted title in himself by deed in fee simple from Jane Long to him, dated the 20th October, 1851.

The cause was tried before Morrison, J., without a jury, at Sarnia, at the Fall Assizes of 1879.

The plaintiffs put in the patent for the land, dated 22nd August, 1851.

It stated that Jane Long, widow, had contracted with the Commissioner of Crown Lands for the absolute purchase of the east half and north-west quarter of lot No. 28, in the 6th concession of the said township, at and for the price or sum of £60, containing 150 acres; and then, in consideration of the said sum by the said Jane Long to the Commissioner of Crown Lands paid, the said land was granted to "the said Jane Long upon the conditions below stated: * * To have and to hold to the said Jane Long, for the use and benefit of herself and children,

Margaret, Robert, and Mary Long, their heirs and assigns for ever; and also to have and to hold the said parcel or tract of land hereby granted, conveyed, and assured unto the said Jane Long upon the conditions above stated, her heirs and assigns forever."

The words in the *premises*, "her heirs and assigns forever," were obliterated.

Robert Long said: "I am one of the plaintiffs. Margaret Kirklaw and Mary Goodwin are sisters of mine. James Goodwin is my brother-in-law. My mother's name was Jane Long. She is the person described in the patent. Myself and my said two sisters are the children named in the patent."

For the defence *William Cowan* said: "I was present and saw the deed to defendant executed, and was a witness to it. It is dated 20th October, 1851. It is from Jane Long, the mother of the plaintiff, to Alexander Anderson, conveying, for £50 consideration, in fee, the east half of the said lot, containing 100 acres more or less. Anderson was living with his sister Jane Long. He commenced clearing the same season he got the deed. He has been in occupation of the premises ever since. It was a wild lot then. No one was living on it at that time. Mrs. Long was living on the adjoining farm."

A nonsuit was moved for, but the learned Judge entered a verdict for the plaintiffs, for the three undivided fourth parts of the land, reserving leave to the defendant to move.

In Michaelmas term, November 19, 1879, *Falconbridge* obtained a rule calling upon the plaintiffs to shew cause why the verdict should not be set aside and a verdict entered for the defendant, pursuant to the leave reserved, on the ground that by the patent from the Crown the legal estate was in Jane Long, the mother of the plaintiffs.

During the same term, November 29, 1879, *R. M. Meredith* shewed cause. The question is, whether Jane Long took by the patent the legal estate in the land.

The grant must be read so as to give effect to the whole of it. For this purpose the second *habendum* must be transposed, and read as the first. By so reading it a fee is created in Jane Long and her three children named : *Goldie v. Taylor*, 13 U. C. R. 603; *Doe dem. Snyder v. Masters*, 8 U. C. R. 55; *Burton* on Real Property, 8th ed., p. 45, sec. 159; *Smith*, on Real and Personal Property, 5th ed., p. 268, sec. 678; *Fair v. McCrow*, 31 U. C. R. 599; *Mitchell v. Smellie*, 20 C. P. 389; *Sheppard's Touchstone*, 5th ed., 114.; *Tyler v. Moore*, 42 Penn. 374; *Nightingale v. Hidden*, 7 Rhode Id. 115; *Tyrrell's Case*, Tudor's Leading Cases on Real Property, 3rd ed., pp. 340, 346, 353; *Washburn* on Real Property, 3rd ed., vol. ii., pp. 372, 397, 409.

Bethune, Q. C., contra. The construction urged by the other side cannot have the effect contended for. Under the grant the fee is in Jane Long herself : *Thomas's Coke* on Littleton, p. 426 American paging, English paging, 546, book 2 ch. 16, 27 a and note; *Brooks v. Brooks*, Cro. Jac. 434; *Viners Abridg.* Grant A a; *Cruise's Digest*, 4th ed., Tit., Deed, ch. 20, p. 244 secs. 6, 7, 8, 10.

March 5, 1880. WILSON, J.—It was suggested that the case might be settled, and it stood over for that purpose, but no settlement can be made.

The grant in question must be read as follows, in order to give effect, as far as possible, to every word of it. That is, we must transpose the second *habendum* by reading it as the first *habendum*. The grant will then read in the premises to be to Jane Long upon the conditions afterwards stated: to have and to hold the same to the said Jane Long upon the said conditions, her heirs, and assigns for ever.

In this way a fee is created upon and by which the *use in fee*, which has not been yet declared or disposed of, can operate in fee; and now will follow what is in point of form the first *habendum*, which must, as it ought to be, used as the second *habendum*, disposing of the *use*: to have and to hold the said land, for the use and benefit of

the said Jane Long, and her three children, their heirs and assigns for ever.

In this way, the patent being a common law conveyance, the grantees of the *use* first declared will take the fee simple in the land by the statute of uses, which was the plain and certain intent of the Crown.

I do not see why in *Goldie v. Taylor*, 13 U. C. R. 603, the children of Ann Goldie did not take a legal estate for life along with herself, and it would seem as if the use (it is called *trust* there but that is of no consequence) is from the report of the case only for life, that there was a failure of the grant for any larger estate, or there was a resulting trust of the estate upon the determination of the life interests in favour of the Crown.

In this case the verdict was quite right, and the rule must be discharged.

Rule discharged.

HOPE ET AL. V. FERRIS.

Principal and agent—Proof of agency—Partnership—Co-ownership—Purely money demand—A. J. Act.

The plaintiffs and several others, including one W., were tenants in common of certain oil lands, on which an oil well was sunk. In 1875 W. conveyed his interest to the defendant by way of mortgage for a loan, and defendant received from time to time from the plaintiffs, who, as they alleged, had at the request of the several co-owners acted as their agents, the amount of W.'s share of the proceeds of the sale of oil. The plaintiffs having incurred heavy liabilities in sinking new wells, and claiming that in so doing they had acted as the defendants' agents, brought an action against the defendant to recover her proportion thereof.

Held, that the evidence, set out below, failed to establish any such agency :

Held, also, that the defendant did not by reason of the mortgage to her, and of the receipt of the proceeds of the oil, assume any liability which W. was under in respect to his co-owners; but, even if she did, her position would be that of a partner, and she would be entitled, before an action would lie against her, to have the partnership accounts taken, and the balance ascertained or admitted to be due.

Held, also, that the plaintiff's claim was not a purely money demand, so as to be recoverable as such at law under the A. J. Act.

THIS was an action on the common counts, for work and labour, money paid, and on account stated.

Plea : Never indebted.

The cause was tried before Osler, J., without a jury, at Toronto, at the Winter Assizes of 1880.

At the trial it appeared that in 1875 the plaintiffs and seven other persons, among them one C. J. Whitehead, were tenants in common in different proportions of certain land in Butler County, Pennsylvania, in which was an oil well which they were working at a profit. Whitehead had a one-eighth share or interest, and the plaintiffs seven-sixteenths. On the 31st of October, 1875, Whitehead conveyed his interest to the defendant by way of mortgage for a loan of \$6,000, and notice of the assignment, though not of its terms, was given soon afterwards by the defendant's solicitor to the plaintiffs, and it was duly registered in the local registry office.

One of the plaintiffs said that they, being the owners of the largest interest in the land, had been requested from

the commencement to act as agents for the others, and that they had done so to the present time.

At the place where the oil works were carried on the owners were known as the Canada Oil Company, and as the oil was sold the proceeds were remitted to the plaintiffs, who kept an account of the receipts in that name, and from time to time divided the money so received among the owners in proportion to their interests.

The plaintiffs received payments in this way at different times during the years 1876, 1877, and 1878. In the year 1879, heavy liabilities were incurred by the plaintiffs for putting down new wells and working expenses, and the sum claimed in this action was said to be the proportion payable by the defendant of what the plaintiffs had actually paid on account of such liabilities. Other debts were yet to fall due, a proportion of which it was expected the defendant would have to pay, and some of the other owners had not paid their proportion.

The plaintiffs admitted that they had no agreement with the defendant further than what might appear in her letters to them, and she had never acknowledged the correctness of the balance sued for. They did not keep any separate accounts of the business until the property ceased to be a paying one. Meetings of the company were frequently held. The defendant never attended them, and, with one exception, she never had notice of them.

Several letters written by the defendant's solicitor to the plaintiffs were put in. It was admitted that he had authority to write them. In the first, dated the 8th of February, 1876, after acknowledging the receipt of a letter enclosing proceeds of certain stock sold for her by the plaintiffs, he says: "Will you kindly advise me when any sale of oil is likely to be made, as Mrs. F. is in want of money, and this is the only source she now has to look to. Of course when sales are made, no matter by whom, the proceeds of Mrs. F.'s share must be paid into your hands as her agents, and *not on account of any other party.*"

On the 18th of March, 1876, he wrote again: "Will

you kindly advise me of the result of your Mr. Hope's late visit to the oil territory as to sales of oil," &c., "and whether the proceeds are to be devoted to sinking additional wells or distributed among the owners." In the same letter he also asked as to the position of shares in which the defendant was interested. And on the 5th of February, 1877, he acknowledged the receipt of dividends on stock and \$343.72 share of proceeds of oil: "This is a very satisfactory result from the oil venture, and I hope the project of increased returns may be realized."

In the plaintiffs' letter of the 3rd of February, 1877, to which the last was a reply, they say: "You will see by the date that we have kept back the oil money a long time. The reason was this: we were sinking a new well, and had it turned out a bad one, or a dry hole, we might have had trouble in re-collecting the money to pay for sinking; but it has turned out a good one, and we hope will soon pay for itself."

On the 26th of December, 1878, the plaintiffs wrote to the defendant's solicitor, advising that they had been drawn upon by their banker in the oil regions for \$188.52, of which the defendant's share, one-eighth, was \$23.50, of which they asked remittance. The letter went on to say: "We are calling a meeting for Saturday to decide about putting down a new well at a cost of about \$1,200. Mr. Temple and Sewell were down lately, and think it a good thing to do."

In reply to this letter the defendant's solicitor wrote on the 28th of December, 1878, asking if the \$188.52 was for running expenses, or a balance of other liabilities, and continued: "Mrs. Ferris is a little short of funds at present, and would be obliged if you would kindly make it right and hold her for the amount for a little time."

The sum charged against the defendant in the foregoing letter, together with a proportionate share of the expenses of two of the co-owners to Petrolia and back, \$84, formed the first item in the particulars of demand.

On the 2nd of September, 1879, the defendant's solicitor

wrote to the plaintiffs : "As I do not exactly understand the nature of the liabilities of the Canada Oil Company, having no notice of their being incurred, will you kindly furnish me with a statement shewing how the money was expended, so that I can arrive at a decision in the matter on behalf of Mrs. Ferris."

From a statement put in by the plaintiffs it appeared that the total liabilities of the oil company were \$8,172.56, made up as follows :

Balance due in cash as per account.....	\$ 579.25
Draft at 10 days, due 2/ 5 August.....	910.40
" 30 " 22/25 " 	875.00
Note to Backus, " 24/27 " 	382.71
" Michie, " 9/12 Sept.....	4,550.00
Draft at 60 days, " 21/24 " 	875.00
<hr/>	
	\$8,172.36

It was admitted that if the plaintiffs were entitled to recover the verdict should be for \$500, and the learned Judge entered a verdict for the plaintiffs for this sum, leaving the facts to be disposed of by the Court upon the evidence.

In Hilary Term, February 4, 1880, *Bethune*, Q. C. obtained a rule to shew cause why the verdict should not be set aside and a verdict entered for the defendant, on the following grounds :

1. On the evidence no action at law would lie, as the dealings between the plaintiffs and the defendant were really partnership dealings, and the items of the plaintiffs' claim constitute part of the partnership accounts.
2. The partnership was one at will, and the plaintiffs' proper remedy is by a bill in Chancery to wind up the partnership and adjust the accounts between the parties.
3. If the evidence does not shew the existence of a partnership, then it shews that the plaintiffs, as tenants in common of the land, made certain expenditure upon it, and that their remedy is by a bill in equity for partition and

sale, and to have owelty of partition, and to recoup their expenditure.

4. There was no evidence of an account stated.

In the same term, February 16, 1880, *McCarthy*, Q. C., shewed cause. The parties interested in this oil property are not partners. They are co-owners, and as such entitled to sue one another for the expenses connected with the developement and working of the property. There is abundance of evidence in the letters to shew that the defendant looked upon the plaintiffs as her agents, and as long as the wells continued to yield a profit she approved of their management. It was only on a loss occurring, and a demand being made, that she objected to bear her share. The plaintiffs had no notice or knowledge that she was only interested in the property as a mortgagee; they thought she had purchased, and treated her as the owner of Whitehead's share. The claim is a purely money demand, and recoverable as such under the Administration of Justice Act. There is no reason why the claim cannot be entertained at common law as well as in equity. In any event the plaintiffs must recover \$23.50 on the account stated: *Lindley on Partnership*, 4th ed., p. 59-61; *French v. Styring*, 2 C. B. N. S. 357.

Bethune, Q. C., contra. The defendant was only a mortgagee. She was not notified of meetings of the company, and took no active part in its management. All the co-owners are partners. If not partners, one co-owner cannot sue another at common law. The plaintiffs' only remedy is by bill in equity. The claim sued on is not a purely money demand recoverable under the Administration of Justice Act. There is no evidence of an account stated.

March 5, 1880. *OSLER, J.*—The plaintiffs base their claim on two grounds. 1. That they has expended the money, sought to be recovered, as the defendant's agents, and at her express or implied request. 2. That as co-owners of the property they are entitled to be repaid a

proportion of the expenditure incurred in working it for the common interest.

The defendant contends that the parties interested are partners, and that no action will lie at law, the partnership accounts not having been taken, and no balance having been ascertained or admitted to be due; and further, that if the plaintiffs and defendant stand to each other only in the position of co-owners, there can be no recovery in the absence of an express promise.

We think the evidence does not bear out the plaintiffs' contention that the defendant authorized them to act for her as agents in the management and working of the property in question, so as to fix her with any personal liability. In determining what weight should be attached to her acts and correspondence her interest in the property and the time and manner in which she acquired it, must be considered. She was not one of the original adventurers, and her interest in the property is only that of a mortgagee of a share of one of them. Her solicitor's letter of the 8th of February, 1876, has been relied upon, but looked at fairly it is evident that it is only a notice that any money which may come into the plaintiffs' hands out of the proceeds of the oil are to be held by them for her and not for Whitehead, the mortgagor, to whom, in the absence of some notice of that kind, the share would otherwise naturally have been paid. And the fact cannot be overlooked in considering what the defendant meant in calling the plaintiffs her "agents" in this letter, that they then were acting, and afterwards continued to act as her agents in connection with shares and stock in which she was interested. Such a letter is a very slight foundation for charging a mortgagee with heavy expenditure in opening new wells or otherwise developing the common property. The plaintiffs' letter, of the 3rd February, 1877, is strong to shew that the plaintiffs and other owners of the property were managing and developing it without reference to the defendant. That letter evidently contains the first intimation she received that a new well had been put down,

and explains the delay in remitting proceeds of a sale of oil, by the fact that it had been kept back until it could be seen whether the venture would succeed. From that time until the end of December, 1878, the defendant is not shewn to have taken any part in the management of the property. The plaintiffs then wrote her that they were calling a meeting to decide about putting down a new well at a cost of about \$1,200. There is no evidence that the result of this meeting was communicated to her, even if she would have been bound by it, or that she directly or indirectly authorized the expenditure which was soon afterwards made, to the extent of upwards of \$8,000. We shall refer afterwards to the letter of the defendant's solicitor, of the 28th December, 1878.

So far as the plaintiffs' claim depends upon the ground of agency, we think it fails.

As to the claim arising out of the relation of co-ownership.

In *Lindley* on Partnership, 4th ed., p. 59, in treating of the distinctions between co-ownership and co-partnership, it is said: "When, however, co-owners of property employ it with a view to profit, and divide the profit obtained by its employment, the difference if any between them and partners becomes very obscure. The point to be determined is whether from all the circumstances of the case, an agreement for a partnership ought to be inferred; but this is often an extremely difficult question. If each owner does nothing more than take his share of the gross returns obtained by the use of the common property, partnership is not the result. On the other hand if the owners convert those returns into money, bring that money into a common stock, defray out of it the expenses of obtaining the returns, and then divide the net profits, partnership is created in the profits, if not also in the property which yields them."

French v. Styring, 2 C. B. N. S. 357, is referred to, and was relied upon by the plaintiffs. There two persons being the owners of a race horse, agreed that one should keep and train and have the general management of the horse,

the expenses of its keep to be borne jointly, and the winnings to be divided. One of them having paid all the expenses, it was held that he might recover from the other a moiety of the disbursement as being in the nature of an advance of capital by one partner to the another. There the plaintiff's right to recover was rested upon the existence of the agreement. The author adds a *quære* whether there was in this case a partnership in the profits, and says that it would seem not, the agreement being to divide the winnings as gross returns.

Again, on page 61: "Tenants in common or joint tenants of a mine or quarry may, or may not, be partners; and the mine or quarry itself may or may not be part of a common stock. But it is highly inconvenient, if not altogether impossible, for co-owners of a mine to work it themselves without becoming partners," and Courts of Equity are in the habit of regarding persons "who work a mine or quarry in common * * as partners-in-trade rather than as mere tenants in common of land."

Several cases are considered: "1. The co-owners may be partners, not only in the profits, but also in the mine itself. * * 2. The co-owners may not be partners at all; neither in the profits nor in the mine. * * 3. The co-owners of a mine may work it together, bring the produce into a common fund, and be partners in the profits of the mine, but not in the mine itself. In this case the mutual rights and obligations of the owners are determined partly by the law of partnership and partly by the law of co-ownership, and some curious anomalies are the consequence."

One of those noted is, that each co-owner may transfer his interest in the mine and in the partnership working it, without the consent of the other owners.

We are disposed to think that the defendant as mortgagee did not, by the receipt of the proceeds of sale of oil payable in respect of the share of the property mortgaged to her, assume any liability which Whitehead, the mortgagor, was under with respect to his co-adventurers and owners: *Bullen v. Sharp*, L. R. 1 C. P. 86. But if

the effect of the mortgage and the receipt of proceeds of the oil be to place her in all respects in Whitehead's position, we think that that is the position of a partner, as in the third instance put by Mr. Lindley in *loc. cit.*

The same reasons which make it inconvenient or impossible for co-owners of a mine to work it themselves without becoming partners (see *Jefferys v. Smith*, 1 Jac. & W., 298), apply very forcibly to the co-owners of an oil well. We think, both on principle and authority, they should be held to be partners on such a state of facts as the evidence in this case discloses.

Assuming that the plaintiffs and defendant were partners, it was urged that the plaintiffs' claim was a purely money demand, and as such recoverable at law under the Administration of Justice Act, though the plaintiffs' right to recover be an equitable one only.

We do not think that the claim of one partner upon his co-partner, for what may be found due to him on winding up the partnership, can be called a purely money demand. The assets must be realized and the partnership wound up before the amount of such a money demand can be ascertained. Other equities are involved and must be administered before anything can be adjudged to the plaintiffs. *Hall v. Lannin*, ante p. 204.

There is no reason why the plaintiffs should not recover the \$23.50, mentioned in the letter of the 26th of December, 1878. That sum may be said to have been paid at the defendant's request. The rule will be absolute to reduce the verdict to that sum.

Rule absolute to reduce verdict to \$23.50.

See *Bentley v. Bates*, 4 Y. & C. Ex. 182; *Gibson v. Lupton*, 9 Bing. 297; *Helme v. Smith*, 7 Bing. 709; *Henderson v. Eason*, 17 Q. B. 701; *Baker v. Casey*, 19 Grant 537; *Mason v. Norris*, 18 Grant 500; *Gage v. Mulholland*, 16 Grant 145; *Green v. Briggs*, 6 Hare 395.

Rule absolute.

BALLANTYNE V. WATSON.

Sale of goods—Proof of contract—Parol evidence—Price—Time—Inspection of goods—Agency—Equitable defence—Damages.

Where a contract is to be made out from letters and telegrams, it is not essential that each should refer in terms to the preceding one, but the connection may be made out even from the subject-matter of the correspondence, so long as it appears that all relate to the same contract. On 30th August, 1879, the plaintiff telegraphed the defendant: "Quote price for August cheese, and number of boxes, to which defendant replied, "six cents." The plaintiff then telegraphed: "Your offer of August cheese at six cents accepted." On 8th September, defendant wrote to plaintiff: When will you inspect and ship? We will ship at Lucknow and Wingham about 700 August. * * Will expect you to inspect and ship in the usual time, say middle of month." On the 11th September, plaintiff replied that he would ship "next week" (which ended on 20th September). On 15th September, plaintiff again wrote, asking defendant, "When will it be convenient for you to ship your August cheese, and at what stations. Please let me know at once, as we would not want to ship later than Monday or Tuesday of next week. On the 18th September, defendant replied that he had already informed him of the stations, "and we were expecting to ship this week." On the 19th, plaintiff wrote requesting delivery at the places named on Wednesday (which would be) the 24th. The defendant afterwards refused to deliver the cheese, and this action was brought for non-delivery.

Held, that from the telegrams and letters, read in the light of the parol evidence, set out below, the surrounding circumstances, and the position of the parties, a valid contract was established for the sale of 700 boxes of cheese at six cents per lb.; that the price mentioned was not indefinite, it being shewn that cheese was always put up in boxes, of an average weight, and sold at so much per lb.

eld, also, that even though inspection might be a term of the contract, this was chiefly for the plaintiff's protection, and he might waive it, as he did by his letter of the 19th September.

Held, also, that even though the defendant acted merely as agent of certain cheese factories, he contracted in his own name without qualification, and was therefore personally liable.

It was urged that time was of the essence of the contract, and that the plaintiff should have proved a readiness to accept by the time stipulated, which defendant contended was 20th September; but, **Held**, that the evidence shewed that time was not intended to be so considered; that the contract was only for delivery within the usual time, and that if delivery by the 20th was a condition precedent, it was waived by defendant's letter of the 18th.

Held, also, that in the absence of any joint contract by plaintiff with the several cheese factories, his proceeding against one of them for the amount they had to deliver, and settling with it, did not preclude him from now suing defendant for damages for the residue of the cheese not delivered.

Held, also, that the fact of plaintiff having contracted to re-sell to a third person, would not limit his damages to the price agreed upon on such re-sale, though less than the market price.

COMMON PLEAS, HILARY TERM, 43 VIC., 1880.

DECLARATION: that it was agreed between the plaintiff and the defendant that the defendant should sell, and the plaintiff should buy from the defendant 700 boxes of cheese of August make, at the price of six cents per pound, to be delivered at Wingham and Lucknow, and paid for on delivery, alleging performance of conditions precedent, and averring as a breach non-delivery.

Pleas.

1. Non assumpsit.
2. That the cheese were to be delivered during the week ending on the 20th of September, 1879, and, although the defendant was ready and willing, and offered to deliver the cheese during the said week, the plaintiff refused to accept or pay for the same.
3. The cheese were to be delivered within a reasonable time after the making of the agreement, and although the defendant was ready, &c., the plaintiff refused to accept or pay.
4. On equitable grounds, that defendant made the agreement as agent for three cheese manufacturing companies in Ontario, and before the defendant signed it was agreed and understood between them and the plaintiff that he should only sign it as agent so as to bind the companies and not to make himself personally liable as principal: that the agreement was made by letters and telegrams, and was signed by the defendant in his own name, by mistake, without stating his representative capacity, both parties then believing that the agreement was made as aforesaid, and that the defendant would not be personally liable for its performance, but that the cheese companies alone would be liable, and bound thereby. Averment, that the said companies were in fact bound thereby, and that the defendant had authority to make it, and that the plaintiff is inequitably taking advantage of the mistake in the bringing of the action against the defendant and seeking to make him liable as principal.

Issue.

The cause was tried before Osler, J., without a jury, at Toronto, at the Winter Assizes, 1880.

At the trial it appeared that the plaintiff carried on a large business at Stratford as a cheese factor. The defendant resided at Carlisle. Each of the parties knew that the other was in the cheese trade, and in a former year there had been some isolated business transaction between them.

To prove the contract out of which this action arose the plaintiff put in certain telegrams and letters, which had passed between himself and the defendant.

No. 1. Telegram, plaintiff to defendant at Belmore, "Stratford, 30th August, 1879. Quote price for August cheese, and number of boxes."

No. 2. Telegram defendant to plaintiff. "Belmore, 30th August, 1879. Six cents * * ."

No. 3. Telegram, plaintiff to defendant at Wingham. "Stratford, August 187-. Your offer of August cheese at six cents accepted."

It appeared that this message was sent on 30th of August.

No. 4. Letter from defendant to plaintiff:

"Wingham, Sept. 8th, 1878.

"When will you inspect and ship. We will ship at Lucknow and Wingham about 700 August. I have about 100, last half July, at Black Horse, and 140 Aug. As matters did not turn out very satisfactory last fall [word illegible] bothered with parties saying when will they be shipped, will they be taken, &c. Will expect you to inspect and ship in the usual time, say middle of month. We are making at Black Horse and Belmore on the Arnold plan, and thus far quite successfully, * * .

"Answer by return of mail and oblige."

The plaintiff replied on the 11th of September, 1879.

No. 5. "Your esteemed favour duly received. Will take your July cheese, and ship the whole of your cheese next week, of which you will be duly advised." The *next week* referred to in this letter would end on Saturday, the 20th September.

No. 6. Plaintiff to defendant.

“Tuesday, 15th September, 1879.”

“Please let me know when it will be convenient for you to ship your August cheese, and at what station. Please let me know at once, as we would not want to ship later than Monday or Tuesday next week.”

The defendant replied to this on the 18th September.

No. 7. “Your card of the 16th just received. In reply, I would say that I have already informed you by letter that Wingham and Lucknow was our shipping stations, and we were expecting to ship this week, &c.”

No. 8. Plaintiff to defendant.

“19th Sept., 1879.

“You will please deliver cheese at Lucknow and Wingham on Wednesday. Will have my man there to receive them.”

No. 9. On Monday, the 22nd, the defendant telegraphed to the plaintiff: “Two factories refuse you August cheese; third meets to-day; will forward result.”

To this the plaintiff on the same day replied by telegram, insisting on delivery of the cheese according to instructions.

The defendant was agent and salesman of several cheese factories, known as the Black Horse or Silver Lake, the Beaver, and the Belmore, and it was the August cheese of these factories which he was selling to the plaintiff. He and two other salesmen, appointed by the factories, had authority to make sales of all the cheese manufactured by them. The plaintiff supposed that defendant was an agent, but until the receipt of the letter of the 8th of September, did not know for what factories he was acting. From that letter he understood that he was acting for the Belmore and Black Horse factories, and for some third factory, the name of which he did not know until later.

As to the time of removal, the plaintiff said: “There is a sort of general understanding that cheese is to be taken

within from twenty to thirty days if there is nothing stated, but considerable latitude is allowed in the matter. We always consider the cheese should be thirty days old. In warm seasons it would be riper at twenty days than in thirty days in other seasons. The twenty or thirty days refers to the age of the cheese."

Walter C. Hately, a cheese factor, said : "Thirty days from its make is a maximum time for taking cheese."

The defendant, on cross-examination, said that these statements were partly correct. "From ten days to thirty is a maximum time for shipping." The "usual time" in the letter of the 8th, would be from the 10th to the 30th. The 15th is a time that cheese is very often shipped : later in the season they will be as late as the 30th, sometimes later.

As to inspection, the plaintiff said that he never contemplated inspecting the cheese; he meant to take them without inspection: that unless he expressly bought subject to inspection he never refused cheese, and assumed the risk of its turning out bad. He said that was the general understanding of the trade. When an inspection was made, it was at the factory. Inspection at the station would involve taking the cheese out of the box. He did not tell the defendant that he did not mean to inspect. He had never bought any cheese from any of these factories before.

James L. Grant said : "Inspection is always at the factory. The factory men will never draw out cheese to the station to be inspected there, and take the risk of having it thrown on their hands. In all my contracts I always express it, subject to inspection. If I do not say anything about inspection, the bargain is closed. * * When the market is going up a man need not be so careful about inspection. * * We make no claim back on the seller ; we take our chances."

Walter C. Hately further said : "I had bought Mr. Ballantyne's cheese right through the year, and never

inspected one of them ; that was because of the reputation of his cheese."

For the defence, *T. J. Stewart*, President of the Silver Lake factory, said: " We were willing to ship the cheese any time of the week ending the 20th. * * We understood inspection was to be at the factory. Our cheese was at the factory ready to be inspected there up to that time. We were waiting to get word to box them after the inspection."

Wm. Roach, President of the Beaver factory, said : " We were ready, up to the night of the 20th of September, to deliver the cheese. No one came for it. We had boxes ready to put it in. We were ready to team it to the station."

The defendant said that the reason for fixing the middle of the month as the time for inspection was that the plaintiff had bought a lot of cheese from him the year before and spent two or three days inspecting them, and the market went down and he did not take them. " Where the buyer accepts the cheese, and nothing is said about inspection, we expect him to inspect it, unless where the salesmen know the buyer they may not require inspection. I had not sold to Mr. Ballantyne before any cheese that he took. I would not have the cheese weighed and boxed, because the plaintiff had not accepted them, and might not take them after they were put in the boxes."

It was admitted to be the duty of the seller to box the cheese and deliver it at the railway station. The average weight of a box of cheese was proved to be about sixty or sixty-one pounds. The market price of cheese, from the 20th to the 24th of September, was 10c. per pound and upwards,

After this action was commenced the plaintiff brought an action against the Belmore factory on the defendants' agreement. This action was compromised by the defendants delivering their proportion of the cheese, consisting of 291 boxes, at seven cents per pound.

A verdict was entered for the plaintiff for \$997.

In Hilary term, February 7, 1880, *Bethune*, Q.C., obtained a rule to shew cause why the verdict should not be set aside and a verdict entered for the defendant, pursuant to the Common Law Procedure Act, on the grounds (1) that no such contract was proved such as declared upon : (2) that if any contract was proved it was a contract made by the defendant as agent for the cheese companies : (3) that upon such contract time was of the essence of the contract, and the defendant did not prove readiness to accept and pay for the cheese by the time stipulated, and the learned Judge who tried the cause was wrong in holding that the defendant waived the stipulation as to time : (4) on the ground that the plaintiff chose to deal with one of the principals, and thereby deprived the defendant of his right of indemnity ; and that if necessary a plea should be added raising this defence : (5) on the ground that the equitable plea was proved ; or why the damages should not be reduced to one half of the verdict.

During the extension of the same term, February 18, 1880, *Robinson*, Q. C., shewed cause.

Bethune, Q. C., contra.

The argument and cases referred to sufficiently appear from the judgment.

March 5, 1880. OSLER, J., delivered the judgment of the Court.

Several objections are taken to the plaintiff's recovery. It is said in the first place that there is no completed contract to be made out from the letters and telegrams, as they are not sufficiently connected together by reference or otherwise.

It is not necessary, however, where a contract is to be made out from letters and telegrams, that each one should in terms refer to the other or to the preceding one. The reference may be made in various ways, and it is enough if the connection be made out even from the subject matter of the correspondence, so long as it does appear that it all relates to the same contract : *Murphy v.*

Thompson, 28 C. P. 233; *Pierce v. Corf*, L. R. 9 Q. B. 210; *Buxton v. Rust*, L. R. 7 Ex. 279.

In the present case no contract was concluded by the telegrams, for the plaintiff could not treat the defendant's quotation of the price of his cheese as an offer to sell, as he seems to have done by his second telegram of the 30th August: *Willing v. Currie*, 36 U. C. R. 46. And moreover the quantity of cheese which the defendant had for sale was not stated. But from those telegrams it appears that the parties were professing to deal with August cheese, the price of which was "six cents."

On the 8th of September, no further communication having in the meantime passed between the parties, the defendant, who seems to have treated the plaintiff's second telegram as completing a contract between them, writes to the plaintiff: "We will ship at Lucknow and Wingham about 700 August." To which the latter replies on the 11th, acknowledging its receipt, and saying: "Will ship the whole of your cheese next week."

Reading these letters in the light of the parol evidence, which may always be given for the purpose of identifying the subject matter of the contract, and of the surrounding circumstances and the position of the parties, we think the reasonable interpretation to place upon them is that they relate to the cheese mentioned in the telegrams which had passed between the parties a few days before; and taking the telegrams and letters together, we are of opinion that a binding agreement is established for the sale of 700 boxes of August cheese at six cents: *Thorne v. Barwick*, 16 C. P. 369, 375; *Benjamin* on Sales, 2nd Amer. ed., sec. 213.

It was next objected that the agreement, assuming it to be good in other respects, was indefinite as to price, it being uncertain whether the price mentioned in the telegram was per pound or per box.

The evidence is, that cheese is always sold put up in boxes and at a rate per pound, and that the contract meant, if its meaning could be explained by parol evidence, 700 boxes of cheese at six cents per pound.

The case of *Spicer v. Cooper*, 1 Q. B. 424, is very much in point. In that case parol evidence was admitted to shew that a sale of fourteen packets of hops at 100s. meant 100s. per cwt., the packets containing more than one cwt. Such evidence is in fact evidence of the usage of the trade and thus of an implied term of the contract.

A further objection was, that by the terms of the contract the defendant had stipulated that the plaintiff should inspect the cheese.

This stipulation was made one of the terms of the contract by the defendant's letter of the 8th September, and it was impliedly assented to by the plaintiff in his reply to that letter. Had nothing been said about inspection the vendee would nevertheless have been entitled to it.

In *Benjamin on Sales*, 2nd Amer. ed., secs. 695, 701, it is said that in offering delivery the vendor is bound to give the buyer an opportunity of examining the goods, so that the latter may satisfy himself whether they are in accordance with the contract. He is not bound to accept goods in a closed cask which the vendee refuses to open. He is entitled to a fair opportunity of inspecting the goods to see if they correspond with the contract.

The evidence falls far short of establishing such an exception to the general rule as the plaintiff contended for, viz., that where nothing was said about inspection it could not be insisted on. He bought, therefore, subject to the right of inspection, which according to his evidence meant that if the cheese did not come up to his standard of inspection he would not accept it. He would expect it to be of a fair quality.

In this case the vendor also had an interest in the inspection, viz., that it should take place before the cheese was boxed and the expense and trouble incurred of delivering it at the railway. By inspection also the vendee could satisfy himself that the cheese was of a merchantable quality, and the vendors by requiring inspection may have desired to free themselves from any implied warranty of quality. Still the stipulation was primarily for the benefit

and protection of the purchaser, and he might dispense with it. He had ample opportunities for inspecting the cheese at the only place where a proper inspection could be made, or made with advantage, viz., at the factories ; and the evidence is clear that it is there only that cheese buyers make inspection.

We think the plaintiff's letter of the 19th September was a waiver or dispensation of this condition. In it he requires the defendant to deliver the cheese at the railway station, on the 24th September, and says that he will have his man there to receive them. If the defendant had delivered there, the plaintiff, in our opinion, could not have rejected them.

Strictly, this defence does not arise upon the record as it stands, but the point having been made and argued without objection, we have disposed of it.

As to the objection taken by the rule that if any contract was proved it was made by the defendant for the cheese factories mentioned in the evidence, it is enough to say that whether this be so or not, or whether or not it appears from the letters and telegrams which constitute the contract who the defendant's principals were, it does appear that he contracted in his own name without qualification, and on this ground he is personally liable : *Thompson v. Davenport*, 2 Sm. L. C., 7th ed., 386, 390 ; *Dale v. Humfrey*, E. B. & E. 1004 ; *Higgins v. Senior*, 8 M. & W. 834.

It was also urged that the defendant's equitable plea was proved, so that the case was brought within the authority of *Wake v. Harrop*, 6 H. & N. 768, 1 H. & C. 202, and that the real agreement between the parties was that the defendant was not to be liable as principal, and that the plaintiff was inequitably taking advantage of a mistake in the written contract.

The evidence, however, does not bear out this contention.

The plaintiff said, and it was not contradicted : "There was no understanding with Mr. Watson that I should look to any one but him for the cheese, or that I should not look

to him. At the time he entered into the contract with me, I did not know for whom he was acting: he did not tell me. * * * Nothing verbal or written passed between us, except what I have told you. I did not see him, nor have any communication with him until the 26th September."

It derives no support from any of the correspondence between the parties, and there was no personal communication between them until the 26th September, after the factories had refused to deliver the cheese.

One of the grounds most strongly urged at the trial and in term was that time was of the essence of the contract, and that the plaintiff did not prove readiness to accept and pay for the cheese by the time stipulated, which, as the defendant contended, was the 20th September.

In *Benjamin on Sales*, sec. 593, it is said, that "in determining whether stipulations as to the time of performing a contract of sale are conditions precedent, the Court seeks simply to discover what the parties really intended, and if time appear, on a fair consideration of the language and the circumstances, to be of the essence of the contract, stipulations in regard to it will be held conditions precedent."

Story on Sales, 4th ed., sec. 310, is to the same effect.

In this case, looking at the contract and the circumstances of the case, we think the parties did not intend that time should be of the essence of the contract. In the defendant's letter of the 8th September, he says, "Will expect you to inspect and ship in the usual time, say middle of month," a mode of expression not in itself indicating a stringent intention on his part that the contract should be off if not carried out by the 15th. In his reply the plaintiff says, "Will ship the whole of your cheese next week," an extension of five days, which the defendant passed over without remark, although he now insists that the plaintiff thereby fixed a distinct time for completing the contract. But when these letters are read in the light of the defendant's own evidence as to what the "usual time" for taking delivery of cheese under such a contract was, we see that

the usual time might be from ten to thirty days. It seems to us, therefore, that the parties have merely stipulated for delivery within the usual time, which might, under the circumstances, extend to thirty days. The defendant's letter of the 18th, if not confirmatory of this view, as we think it is, strongly supports the plaintiff's contention that the stipulation as to time was waived, for when the plaintiff in his letter of the 16th speaks of taking the cheese on the 22nd or 23rd, the defendant, instead of at once replying that unless they were shipped on the 20th the contract would be considered off, only says, "We were expecting you to ship this week," and repeats the information asked for by the plaintiff as to the shipping stations, which could only be of value as shewing him where he could send to receive the cheese. See *Pollock* on Contracts, 2nd ed., 444-5.

Two other objections remain to be considered. The defendant says that the plaintiff has elected to proceed against one of his principals on this very contract, and has made a settlement with that principal by which his position as agent has been altered to his prejudice. This defence also does not arise on the record; but the rule asks for permission to add such plea as may be necessary action to raise it. The fact appears in the evidence that an action was brought by the plaintiff against the Belmore Cheese Factory, which that factory had settled with the plaintiff by delivering their proportion of cheese at seven cents per lb. If it had appeared that the defendant had made one joint contract on behalf of the three factories for the sale of their cheese, we should have been disposed to think this objection a formidable one, for although the bringing of the suit against the agent might not be conclusive evidence of the election of the contractor to proceed against the agent instead of the principal, and he might still bring an action against the principal, yet he could only sue one of them to judgment; and we take it the same principle would hold good if he choose, after bringing an action against the agent, to make any compromise or arrangement with the principal: *Smethurst v.*

Mitchell, 1 E. & E. 622; *Priestly v. Fernie*, 3 H. & C. 977; *Curtis v. Williamson*, L. R. 10 Q. B. 57. But as we understand the evidence, we see no joint contract with the three factories, and therefore no reason why the plaintiff should not have made a settlement with one of them for the cheese they were to have supplied.

Lastly, the rule asks that the verdict should be reduced by one half. The damages consist of the difference between the contract price, six cents, and the market price, which, on the 22nd of September, was ten cents per lb.

The ground on which the reduction is asked is that the plaintiff sold the cheese in question at eight cents, and therefore, if it had been delivered to him, his profit would not have been more than two cents per lb. But this is not the way to look at it. The defendant has nothing to do with the profit the plaintiff might have made. Assuming that the plaintiff sold this cheese, he was not able to deliver it, for he had not got it from the defendant. If the sub-sale went off for that reason, the plaintiff was not thereby disentitled from going into the market and purchasing the same quantity at the market price, which was ten cents per lb. Or it is, perhaps, not assuming too much to infer that he filled the sub-contract by the delivery of other cheese, which he would have had to purchase in the market at the increased price, or to supply from his own stock, which was then worth to him ten cents per lb. In either case he would sustain a loss of four cents per lb. There seems, therefore, no reason to reduce the damages. See *Randall v. Raper*, E. B. & E. 84, and notes to Amer. Ed.

On the whole case, we think all the defendant's objections fail, and that the rule should be discharged.

Rule discharged.

WILSON V. HUME ET AL.

Master and servant—Liability for neglect of fellow servant—Duty to hire competent servants—Shipping—Master of vessel.

Held, that a master may, among other duties, delegate to another the duty of selecting fellow workmen or servants, and that in such a case the master's obligation is limited to the exercise of reasonable care in selecting a competent person for such purpose.

In an action against defendants, the owners of a vessel, for employing incompetent sailors, whereby an accident happened to the plaintiff, it appeared that the duty of hiring the sailors had been delegated by the owners to the captain, a competent person for such purpose, and that he had hired the men in question.

Held, that the defendants were not liable.

THIS was an action on the case for negligence.

The declaration set forth that the defendants, being the owners of a vessel called the Twilight, employed the plaintiff as a sailor, in the capacity of mate: that it was the defendants' duty to have employed as (ordinary) sailors fit and competent persons, but that they employed as such sailors unfit and incompetent persons, who were unable to navigate the vessel and perform the duties required of them; and that such persons, while stowing an anchor, did so in such an unskilful and improper manner that it fell against the plaintiff and broke his leg.

The common counts were added.

Pleas. Not guilty; and to the common counts, never indebted.

Issue.

The cause was tried before Cameron, J., and a jury, at Toronto, at the Winter Assizes of 1880.

The facts which appeared in evidence were as follows: The defendants were the owners of the schooner Twilight. The plaintiff was employed by the captain of the vessel as mate, for the season of 1879. He and three others, a man and two boys, formed the crew. On one occasion, on approaching Oswego, he was ordered to take in the anchor, and while engaged in stowing it it fell on him, owing, as was alleged, to the incompetence of some of the crew who were assisting him, and broke his leg. It was said to be

the duty of a captain to hire the men ; sometimes the mate did so. The captain of the *Twilight* always hired them during the season of 1879. In the deposition of one of the defendants, taken before the trial, and put in by the plaintiff, he stated that they had nothing to do with hiring the sailors ; the captain was the party appointed to hire them ; the discharge or dismissal of the seamen was left to the captain, who had full authority to engage such men as were required.

Much evidence was given for the purpose of shewing that the man and boys were not competent sailors, and that it was directly owing to their incompetence and unskilfulness, in not knowing how to stow an anchor properly, that the accident happened. One of the boys had been on the vessel during two former trips to Oswego. The other boy and the man had never, it was said, been on a vessel before.

Evidence was also given with the view of proving negligence on the part of the captain in hiring the crew, but it was not affirmatively shewn that he knew anything of their incompetency before the vessel had begun her voyage.

No evidence was given under the common counts.

At the close of the plaintiff's case the defendants' counsel moved for a nonsuit, chiefly on the ground, that if any negligence was proved it was that of a fellow-servant in a common employment, and the learned Judge, being of that opinion, non-suited the plaintiff accordingly.

In this term, February 6, 1880, *J. Reeve* obtained a rule *nisi* to set aside the nonsuit, on the ground that there was evidence in support of the cause of action, upon which the jury would have been justified in finding in his favour ; and that the nonsuit was contrary to law and evidence, &c.

In the same term, February 17, 1880, *McCarthy*, Q.C., and *E. D. Armour*, shewed cause. Up to within a short time of the argument, when the case of *Smith v. Howard*, 22 L. T. N. S. 130, was found, the point raised did not appear to have been hitherto expressly decided, either in

the English or our Courts, although the case of *Wilson v. Merry*, L. R. 1 Sc. 326, relied on at the trial, strongly bore out the defendant's contention, that where a competent manager was selected, his acts, no matter whether in employing men or supplying machinery, were, in so far as the other employees were concerned, the acts of a fellow-servant. The case of *Lanning v. New York Central R. W. Co.* 49, N. Y. 521, and the other American cases relied upon by the plaintiff, certainly supported the view contended for by him. The case of *Smith v. Howard*, 22 L. T. N. S. 130, is, however, expressly in point. In several English cases discussing the liability of a master for the acts of a fellow-servant, much stress has been laid by the Judge upon the importance of preserving intact the doctrine of non-liability of the master. In the present case, the defendants, by employing a competent captain, had fully discharged the duty resting upon them, and that is the only safe way in which such duty could be discharged. In many cases, such as the present, where the owners did not pretend to be practical men, any attempt by them to do acts which required certain practical knowledge and skill, no matter what care might be exercised by them, instead of being in the interests of the employees, would be attended with risk to them; and when they secure the services of one fully competent to do these acts, they must be held to have exercised reasonable care in the discharge of this duty. The crew of a vessel know that the captain is the person who generally engages the crew, and, provided that the captain be a competent person, it is not unreasonable to hold that they undertook the risk of his failing to employ competent men amongst the other risks of the employment.

J. Reeve, contra. The plaintiff admits that had the injury been occasioned through the neglect of a competent fellow servant, the owners of the vessel would not be responsible; but he bases his action on the ground that the accident was the result of the employment of an incompetent crew, and that there existed between the plaintiff and the owners an implied contract that in the selection

of a crew ordinary care and skill would be exercised to obtain a competent one. This contract was one to be affirmatively and positively performed, and the defendant cannot, by delegating this duty to another, relieve himself of responsibility. The plaintiff does not contend that there is a warranty that the crew shall under all circumstances be competent, but that ordinary care shall be exercised to that end by whoever undertakes to make the selection, whether it be the owners themselves or some one appointed by them. The act of hiring the crew was not part of the common employment, in the doing of which the captain could be held to stand in the relationship of fellow servant to the plaintiff. The act was antecedent to the common employment. Before the common employment could be held to have commenced, there was a duty to be performed by the owners, viz., the supplying the vessel with proper machinery and appliances, and a competent crew, and then any act done in the navigation of the vessel would be regarded as the act of a fellow servant. It would be inconsistent with the principle on which the non-liability of the master for the act of the servant rests, to hold that the remedy of the servant depends on the question whether the master undertook to perform the duty personally, or employed another to do it. In *Hutchinson v. York and Newcastle R. W. Co.*, 5 Ex. 343, it is clearly laid down that the principle upon which the servant is held to have no right of action for the default of a fellow servant is, that he had the ordinary risks of the employment, and amongst such risks the risk of negligence on the part of a fellow servant, in contemplation, and undertook to incur such risks when he entered into the employment. But in all these cases the risks were confined to the ordinary risks of the service and the risks of the acts of competent fellow servants, and the principle that the master should not expose the servant to the risk of injury by associating him with an incompetent fellow servant is maintained throughout. Before he can seek to limit the ordinary principle of liability for the act of an agent, he must shew that the agent was a competent

one. If, then, the exercise of this care was a duty resting upon the master, and which he was bound to perform, the servant cannot be said to have had the risk of its non-performance in contemplation, but he relied upon the master for its performance. If defendants' contention is correct, not only does the servant undertake the ordinary risks of the employment, and amongst such risks the risk of accident from neglect of fellow servants, but also the risk of the master selecting or not selecting proper machinery and appliances and competent servants, in case the master should not see fit to do the act himself, but employ another to do it. He referred to the following cases: *Lanning v. New York Central R. W. Co.*, 49 N. Y. 521; *Wright v. New York Central R. W. Co.*, 28 Barb. 80; *Wiggett v. Fox*, 11 Ex. 832, 839; *Searle v. Lindsay*, 11 C. B. N. S. 429; *Hutchinson v. York and Newcastle R. W. Co.*, 5 Ex. 343; *Wigmore v. Jay*, 5 Ex. 354; *Bartonhill Coal Co. v. Reid*, 3 Macq. H. L. 266; *Jarvis v. May*, 26 C. P. 523; *Deverill v. Grand Trunk R. W. Co.*, 25 U. C. R. 517.

March 5, 1880. OSLER, J.—The plaintiff does not, in this case, seek to controvert the general rule, that a master is not liable to a servant for injuries sustained from the negligence of a fellow-servant in the course of their common employment. What he does contend is, that he is in a position to avail himself of the qualification of the rule, namely, that the master is bound to use ordinary care to employ none but competent servants; in other words, that he must not have been guilty of personal negligence.

It is urged that this duty of the master is personal and inalienable, and that if carried out by others for his convenience, he is nevertheless responsible for their negligence, as his agents, because they, although in other respects fellow-servants, cannot be so in relation to such duty, which is not one performed in the course of the common employment, and negligence in the performance of which is not one of the ordinary risks contemplated and undertaken by the servant when entering into the employment.

On this ground it was said that the present case was not brought within the decision in *Wilson v. Merry*, L. R. 1 H. L. Sc. 326.

The defendants in that case were the owners of a coal mine, and in consequence of the negligent construction of a platform in the mine the plaintiff's son, a workman in their employment, was killed. The defendants took no part in the construction of the platform, nor was any personal fault or negligence of any kind imputed to them. It was constructed under the superintendence of one Neish, a sub-manager of part of the works, by whom, and under whose superintendence, the deceased was employed, and to whose negligence, but not incompetence, the accident was attributed.

The Lord Chancellor (Cairns) said, at p. 332: "The master is not, and cannot be, liable to his servant unless there be negligence on the part of the master in that which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business. The result of an obligation on the master personally to execute the work connected with his business, in place of being beneficial, might be disastrous to his servants, for the master might be incompetent personally to perform the work. At all events, a servant may choose for himself between serving a master who does, and a master who does not, attend in person to his business. But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so * * When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence this is not the negligence of the master."

Lord Cranworth said, at p. 334: "Workmen do not cease to be fellow-workmen because they are not all equal in point of station or authority. * * On this subject there is no difference between the law of England and Scotland."

Lord Chelmsford, in commenting on the charge of the Judge of the Court of Sessions, said, at p. 338: "What the learned Judge meant to tell the jury was, that if Neish 'had the complete power of engaging and dismissing workmen as he pleased * * without the direction or control of the defenders, he was a superintendent, and not a fellow-workman with the deceased.' * * But if the learned Judge had so directed the jury, it would, in my opinion, have been a misdirection."

Lord Colonsay says, at p. 344: "Culpable negligence in supervision, if the master takes the supervision on himself—or, where he devolves it on others, the heedless selection of unskilful or incompetent persons for the duty, * * may furnish grounds of liability; and there may be other duties, varying according to the nature of the employment, wherein the master * * may be responsible."

Although it was not necessary to decide the precise point in the case from which the foregoing extracts have been taken, they shew that the eminent Judges who took part in the case were of opinion that the master might, among other duties, delegate to a superintendent or foreman the duty of selecting fellow workmen or servants, and that in such case the master's obligation would be limited to the exercise of reasonable care in selecting a competent superintendent or foreman.

In Mr. Campbell's excellent treatise on the Law of Negligence, 2nd ed., 1878, p. 154, the law is thus stated: "What the master does owe to the servant, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so. * * But it would appear that the master sufficiently discharges his duty as to the selection of servants if he employs a competent foreman whose duty it is to engage the servants; and as to the condition of the machinery if he employs competent persons to keep it in order, and it will not bring home liability to the master if it is shewn that the foreman had notice of the habitual negligence of a boy employed in the works." For these propositions he cites

Balleny v. Cree, Sessions Cases, 3rd series, vol. xi. p. 626, and the case referred to on the argument by Mr. McCarthy, of *Smith v. Howard*, reported in 22 L.T.N.S.Ex. 130, (1870.)

We do not find it reported elsewhere.

In that case the accident which caused the injury occurred through the incompetence of a boy for work of the nature he had to perform. The boy was engaged by one Maclareen, the defendant's foreman, whose duty it was to engage or discharge the person employed for the purpose of assisting the plaintiff; and shortly before the accident the plaintiff had complained to Maclareen, who had promised to provide him with more efficient assistance.

The plaintiff was nonsuited.

In arguendo, Herschell, Q. C., for the plaintiff, said, at p. 131 : "The boy was incompetent. It is true the master did not engage him, but it is contended that he cannot discharge himself of his duty to take due care to employ competent servants by delegating his functions in this respect. If he leaves the employment of his servants to a foreman, he is liable if such foreman employ incompetent persons." *Wilson v. Merry*, L. R. 1 H. L. Sc. 326, was cited. The Court, Kelly, C. B., Martin, B., and Channell, B., discharged the rule, holding that the master could only be liable if he had employed an incompetent foreman.

The case of *Howells v. Landore Steel Co.*, L. R. 10 Q. B. 62, may be referred to. In this case the plaintiff's counsel *in arguendo* said, at p. 63 : "It must be conceded that since the case of *Wilson v. Merry*, L. R. 1 H. L. Sc. 326, the doctrine assumed in *Murphy v. Smith*, 19 C. B. N. S. 361, as to the liability of the master for the acts of a person whom he leaves, as it were, as his vice-principal in the management of the concern, is exploded." It was then argued that the defendants were a corporation, and could only act by their manager. Blackburn, J.—"That cannot make any difference; in *Morgan v. Vale of Neath R. W. Co.*, L. R. 1 Q. B. 149, the defendants were a corporation, and nobody thought of suggesting any distinction on that ground."

Cockburn, C. J., in giving judgment, said, at p. 64: "Since the case of *Wilson v. Merry*, it is not open to dispute that in general the master is not liable to a servant for the negligence of a fellow servant, although he be the manager of the concern. * * I cannot say that Thomas was here anything more than a vice-principal, or manager, and he was therefore a fellow servant."

Blackburn, J., said, at p. 66: "When the master personally interferes, he is liable for his personal negligence, just as the individual servant would be. * * There have been several cases in which, whether vice-principal or manager, the person has been held to be a fellow servant. In Scotland it seems that a vice-principal had been held to be in a different position from an ordinary fellow servant. But the decision of the House of Lords is distinct, at least so far as this, that the fact that the servant held the position of vice-principal does not affect the non-liability of the master for his negligence as regards a fellow servant."

In the present case it is not suggested that the captain was not entirely competent to perform the duty of selecting the crew, and any personal negligence on the part of the defendants is out of the question. This being so, the authorities to which we have referred shew, in our opinion, that the defendants are not liable. See also *Smith v. Steele*, L. R. 10 Q. B. 125; *Tarrant v. Webb*, 18 C. B. 797; *Saunders on Negligence*, 154.

In some of the Courts of the United States the rule has been laid down after some fluctuation of opinion somewhat differently, at least in actions against corporations.

In *Lanning v. New York Central R. W. Co.*, 49 N. Y. 521, cited by Mr. Reeve, it is said the duty of the master to the servant and the implied contract is, that the master shall employ skilful and competent fellow servants, and shall use due and reasonable care to that end. It is not enough that the master selects one or more general agents of approved skill and fitness, and confers upon them the duty of selecting, purchasing, or hiring. If the general agent carelessly places by the side of the ser-

vant another unskilled and incompetent and damage results in consequence the master is liable.

And in *Stevenson v. Jewett*, 23 N. Y. S. C. R. (16 Hun) 210, it is said at p. 212: "When the servant, by whose acts or negligence or want of skill other servants of the common employer have received injury, is the *alter ego* of the master, to whom the employer has left everything, then the middleman's negligence is the negligence of the employer, for which the latter is liable."

See also *Flike v. Boston and Albany R. W. Co.*, 53 N. Y. 549; *Union Pacific R. W. Co. v. Fort*, 17 Wallace S. C. R. 553.

The whole subject is also fully discussed in *Wharton's Law of Negligence*, 2nd ed., secs. 240, 241.

In section 241 the author observes: "We may, therefore, accept as binding the ruling of the Court of Appeals of New York, that if the master delegates to an agent the duty of employing workmen, or of originally selecting physical appliances for the conduct of the business, the master is responsible to any servant who suffers injury from the negligence of that agent in the performance of that duty. Indeed, if we do not accept this, it is hard to see in what case a corporation, which can only appoint and dismiss through a general superintendent, can be liable for negligence in appointing or retaining. On the other hand, if the master holds control of the business, and is known to do so, retaining in himself, according to the settled usage of the business, the power of dismissal and retention, it is not right he should be chargeable, in a suit by one servant, with the negligence of another servant in the retention of an incompetent subaltern, when the servant injured could have brought the matter home to the master himself. A servant, to put the matter in other words, who sees an incompetent subaltern at work by his side, and neglects to notify the master of such incompetency, when there is opportunity so to do, and when the master exercises the power of revision, must be presumed to acquiesce in the retention of such subaltern; nor can he

defeat this presumption by shewing that he complained to a middleman or managing agent of the subaltern's incompetency." Beyond this, Mr. Wharton states in a note to the section, it would not be safe to push the case of *Smith v. Howard*, 22 L. T. N. S. 130.

Whatever may be thought of the reasonableness of the rule of the American Courts as illustrated by the cases we have referred to, the present would not be a very reasonable case in which to apply it, if we were at liberty to do so. The risk the plaintiff was willing and undertook to incur was not that of service with a crew to be selected personally by the defendants, who were entirely ignorant of navigation, but with one to be chosen either by the captain or by himself. The personal supervision of the owners or masters is impossible in such a service as this. The duty of hiring the crew was one which might have to be performed in a foreign port, or in one where it might be impossible to communicate with the owners, and the latter were in our opinion bound to no other duty to the plaintiff than to exercise reasonable care in the appointment of a competent manager or captain. This duty they have performed, and while we sympathize with the plaintiff in the injury he has sustained, we think he has no cause of action against the defendants.

Rule d

SMITH V. GORDON.

Work and labour—Architect's certificate—Wrongful dismissal—Notice—Amendment—A. J. Act.

A building contract provided that in case the works were not carried on with such expedition, and with such materials and workmanship as the architect might deem proper, then, with the special and written authority of the proprietor, he should be at liberty, after giving him seven days' notice in writing, to dismiss the contractor, and employ other persons to finish the works, &c.: *Held*, 1. That such special authority meant an authority to be acted upon with reference to some individual contractor, and not a general power to dismiss at the architect's discretion. 2. That the notice should intimate to the contractor in what respect the architect was dissatisfied, and what he required to be done, so that during the time mentioned in the notice the contractor might have an opportunity of removing the objections, in default of which the architect might dismiss him at the expiration of the time, but not before. *Quære*, whether such provision could be acted upon after the time fixed by the contract for the completion of the work.

It was also provided that the architect might dismiss any workman disapproved of, and reject any materials deemed unfit, &c.: *Held*, that this clearly applied to the case of a workman as distinguished from a contractor.

The plaintiff having sued upon the common counts, produced no certificate from the architect, without which, under the contract, no payment was to be made. The dismissal of the plaintiff in exercise of the supposed power given by the contract had been set up by defendant as a defence, and all the evidence given upon it at the trial which could be produced. The Court, under these circumstances, allowed a count to be added in term, claiming for a wrongful dismissal, by reason whereof he was prevented from obtaining such certificate, and entered a verdict upon it for the amount remaining unpaid upon the contract price.

THIS was an action on the common counts, for work done, money lent, &c.

Pleas :

1. Never indebted.

2. Payment.

3. That the plaintiff and the defendant entered into an agreement under seal, dated the 21st June, 1878, whereby the plaintiff agreed to do the carpenter's work and supply the materials in a dwelling house of the defendant, (which work and materials are the subject of the plaintiff's claim), in accordance with certain plans, specifications, and conditions prepared by an architect and made part of the contract, one of which conditions provided that the plaintiff should

not be entitled to any payment without a certificate from the architect that the sum was due ; and that the plaintiff had not, at the commencement of the action, procured the certificate.

4. As to much of the claim as is composed of extras, that the work was done under the contract in the last plea mentioned, one of the conditions of which was that the plaintiff should deliver to the architect or clerk of the works a weekly statement of works deemed to be extras, and that no work not set forth in such weekly statement should be allowed as extra work. Averment, that the plaintiff did not deliver such a statement.

5. As to extras, that the work was done under the contract before set out, and that one of the conditions of such contract was, that the work should not be allowed as extra, by whomsoever directed, unless an order in writing signed by the architect should be produced as a voucher, and included in the weekly statement mentioned in the last plea, and in default that all such work should be deemed part of the work contracted for. Averment, that no such order was given or produced, nor such work included in the proper weekly statement.

6. That no part of the sum claimed by the plaintiff became due from the defendant until the completion of the work : that the plaintiff, before the completion of the work, refused to proceed with the same, whereupon the plaintiff procured another workman to enter upon and complete the plaintiff's work, as the defendant had the right to do ; and the defendant has used due and reasonable diligence in having the same pushed towards completion, but it was not completed before the commencement of this action.

7. That the work was done under the contract mentioned in the first plea, by a condition in which it was provided that the architect should have power to reject any materials that he might deem unfit to be used, and might require any work to be re-done which he might consider unsound or unworkmanlike ; and that the plaintiff should be bound to execute the directions of the architect

without appeal. Averment, that the architect rejected certain materials, and required certain work to be re-done which he considered unsound, &c., but the plaintiff refused to supply proper material in place of that rejected, and refused to do and execute again the works which the architect considered unsound, &c.; whereupon the architect, with the proper authority of the defendant, dismissed the plaintiff from the said works, and employed another workman to carry out the directions aforesaid, and to complete the contract: that the defendant has pressed on the work to completion with reasonable diligence, and the same was unfinished at the commencement of this suit. And the defendant says that neither the whole nor any part of the plaintiff's claim became due under the contract until the completion of the same on the plaintiff's part.

8. Set-off of penalties incurred by reason of delay in completing the works.

Replication : 1. Joinder of issue on all the pleas.

2. *Non est factum.*

3. To third plea, on equitable grounds: that one Joseph A. Fowler was the architect named in the agreement in the said third plea mentioned, and was the architect in charge of the work in the said third plea mentioned during the time of the performance thereof by the plaintiff, and, but for the acts of the defendant hereinafter mentioned, the plaintiff could and would have procured from the said Fowler, as such architect, the certificate mentioned and referred to in the said third plea, and the defendant, in order to prevent the plaintiff from procuring such certificate and in other respects to defeat the rights of the plaintiff, in professed exercise of powers so to do contained in certain stipulations and conditions in the said agreement, dismissed the said Fowler from the position of architect of the said works, and appointed in his place and stead one A. R. Denison to be such architect, and without any default on the part of the plaintiffs, and, although the plaintiff was of right entitled to such certificate, the said Denison, acting under the instructions of the defendant, unfairly and

improperly refused to grant or give such certificate to the plaintiff, though duly requested so to do ; and that, solely through and by the said conduct of the defendant and the said unfair and improper refusal of the said Denison, as such architect, the plaintiff was prevented from procuring and having such certificate ; and the plaintiff says that the defendant ought not now to be permitted to set up the absence or want of such certificate as a defence to this suit.

Issue.

The cause was tried before Osler, J., without a jury, at Toronto, at the Summer Assizes, of 1879.

It appeared that the work sued for had been done under a special contract, by which the plaintiff, in consideraton of the sum of \$1,000, agreed to do the carpenter's work on the house of the defendant in accordance with certain drawings, specifications, and conditions, prepared by the architect, and made part of the contract.

It was admitted that the amount remaining unpaid on the contract price, subject to certain deductions claimed by the defendant, was \$340, and the plaintiff proved that he had done extra work to the amount of \$44. There was evidence that the work which remained to be done under the contract would be of the value of \$25 or \$35. Nothing turned on the eighth plea, as to the penalties for delay.

The conditions of the contract which are material to be considered, are the following :

"(3) That the architect or clerk of the works shall have the authority to dismiss any workman who may be disapproved of, and to reject any materials that may be deemed unfit to be used, even though the same may have been fixed in the works, and to have any work re-done which may be considered unsound or unworkmanlike by him ; and the contractor or contractors shall be bound to execute the directions which may be given in these respects without appeal to any other party, and are not to be claim any additional payment in respect of the same ; and all work not particularized in the drawings or specifications,

entitled to is to be executed according to the directions of the architect.

"(8.) That a statement shall be delivered weekly to the architect or the clerk of the works executed, or partly executed, during the preceding week, which the contractor or contractors may deem to be extra, and no extra work will be allowed which has not been set forth in its proper weekly statement.

"(22.) Should any work or article have been omitted to be defined in the specification which would be obviously intended in the drawings and be necessary to complete the works, the same is to be performed according to the direction of the architect or the clerk of the works, without any additional payment, and no extra work whatever will be allowed to be charged, by whomsoever directed, unless an order in writing be produced as a voucher, signed by the architect, nor unless such work shall have been included in the proper weekly statement of extras; but if such written order is not produced, or if such work was not included in its proper weekly statement, it shall be deemed part of the work contracted for, and not extra work.

"(11.) That in case the works are not carried on with such expedition and with such materials and workmanship as the architect or the clerk of the works may deem proper, then, with the special and written authority of the proprietor, he shall be at liberty, after giving him or them seven days' notice in writing, to dismiss the contractor or contractors, and to employ other persons to finish the works in such manner as the architect may direct; and all sums of money which shall be paid on account thereof, shall be deemed a payment on account of the contract.

"(12.) Payments are to be made fortnightly on account of the contract, as the work shall proceed, to the extent of eighty per cent. of the value of the same, which value is to be in proportion to the amount to be paid for the whole of the works, and is to be ascertained by the architect, whose decision shall be final. The balance of the contract, subject to such addition or subtraction in its amount,

according to the conditions to be entered into, to be paid within four weeks after the amount has been ascertained by the architect.

"(13.) The contractor or contractors shall not be entitled to any payment without a certificate from the architect that such sum is due to him or them, and that the works are carried on to his entire satisfaction."

The defendant resisted payment on the grounds (1.) That by the terms of the contract the plaintiff was not entitled to it without a certificate of the architect that the same was due, and that the work had been carried on to his satisfaction. (2.) That the plaintiff having refused to re-execute certain work which the architect deemed improper had been dismissed, and the defendant had employed other workmen to perform it, and the plaintiff's contract not having been completed at the commencement of the action nothing was due; and (3.) As to extras, that by the terms of the contract they were not to be allowed, unless the orders therefor were given in writing by the architect, and the amount included in a weekly statement of extras, and that the latter part of this condition had not been complied with.

Up to the 31st of December, 1878, the architect in charge of the works, under whose direction the plaintiff had been acting, was Mr. Jas. A. Fowler. After that date the defendant appointed Mr. A. R. Denison, who had been for some time acting as clerk of the works.

On the 13th of January, 1879, Denison gave the plaintiff a written notice, that in accordance with section 11 of the conditions he was dismissed from the works, "the notice hereof to date from this 13th day of January, 1879."

Several attempts were made by the plaintiff and his solicitors, personally and by correspondence, with the defendant and the architect to obtain a statement of the reasons of the dismissal, which were refused, the architect saying that he knew his reasons. They appeared to be that the plaintiff had refused to put a floor in the woodshed, had refused to alter a water-closet, and had refused to put a chair in the porch as ordered by the architect.

Evidence was given at great length on these points.

The learned Judge held that the plaintiff had been improperly dismissed in a manner not authorized by the contract, but that the terms of the contract, as to the necessity of procuring the architect's certificate, were nevertheless binding on the plaintiff so as to preclude him from recovering on the common counts; and he entered a verdict for the defendant, finding for him on the first, second, third, fourth, and fifth pleas, and issues joined thereon, and for the plaintiff on the other issues.

In Trinity term, August 28, 1879, *Ferguson*, Q. C., obtained a rule calling upon the defendant to shew cause why the plaintiff should not have leave to amend, by adding to his declaration a count or counts for improperly and wrongfully dismissing and discharging him from the works mentioned in the pleadings and in the agreement between the parties respecting such works, and why a verdict should not be entered for the plaintiff in respect of or upon such added count, for such sum as to the Court might seem proper; or why there should not be a new trial betwen the parties in respect of the matters of such added count, on such terms as the Court might think proper.

In the same term, *J. E. McDougall* also obtained a rule calling upon the plaintiff to shew cause why the verdict entered for him on the sixth and seventh pleas, and issues thereon, should not be set aside, and a verdict entered in favour of the defendant, on the ground that the verdict was contrary to law and evidence, and the weight of evidence, or that there was evidence which shewed that the plaintiff had refused to complete certain portions of the work that were not in the contract, whereby the defendant was at liberty to employ others to complete the work.

In Michaelmas term, November 21, 1879, both rules were argued together.

J. E. McDougall, shewed cause to the plaintiff's rule and supported the defendant's rule. The plaintiff's right of action arises upon a contract under seal, by which the

architect's certificate is a condition precedent to the right to recover, and therefore without such certificate there can be no recovery under the common counts on a *quantum meruit*: *Oldershaw v. Garner*, 38 U. C. R. 37; *Munro v. Butt*, 8 E. & B. 738; *Gearing v. Nordheimer*, 40 U. C. R. 21; *Ekins v. Corporation of Bruce*, 30 U. C. R. 48; *Ferguson v. Corporation of Galt*, 23 C. P. 66. The plaintiff by his equitable replication to the third plea sought to displace the necessity for the production of the certificate, by the allegation that it was wrongfully withheld, but he failed to establish such replication, and the learned Judge has so found. The mere fact of the defendant having taken possession of the building is no waiver of the terms of the contract: *Oldershaw v. Garner*, 38 U. C. R. 37; *Munro v. Butt*, 8 E. & B. 738. The plaintiff's application to add a count for wrongful dismissal is too late. It would be recasting his whole cause of action, and would place the defendant at a very great disadvantage. His action as declared on is *assumpsit*, and he now wishes to make it tort, and, failing to recover a verdict on the common counts, hopes by a side wind to obtain a recovery for damages. This does not come within the very large powers of amendment conferred by the R. S. O., ch. 49, secs. 7, 8, and ch. 50, sec. 270: *Snyder v. Snyder*, 22 C. P. 361; *Hammond v. Heward*, 20 U. C. R. 36. It is not an amendment, but to all intents and purposes a new action which could never have been contemplated by either party on the pleadings. The plaintiff sets up in his equitable replication to the third plea the wrongful dismissal of the architect who had superintended the building and the appointment of another, and that this was done to prevent the giving of a certificate. It is only for the purpose of establishing, if possible, a wrongful withholding of the architect's certificate. In any event, if the amendment is allowed, as it in reality amounts to a new action, it should only be upon terms of payment of costs of the first action. The dismissal was not wrongful. It is shewn in various parts of the evidence that the plaintiff openly refused to carry out

the commands of the architect. The defendant was not bound even under the terms of the contract to pursue the terms of the contract as to notice, if there was an absolute refusal to perform the work, but could at once employ others to do the work. The notice, however, complied with the contract. As to the objection that the authority to the architect to dismiss was too general in its terms, and that it should have applied to some particular contractor and not to the contractors generally, this is at best but a technical argument. The general power was expressly delegated to the architect to dismiss any contractor, and the evidence shews that it was really given to meet the plaintiff's case, who had been refusing to do the work. The finding of the learned Judge upon the issues which he has found in the defendant's favour, should not be interfered with.

Ferguson, Q. C., contra. No doubt by the terms of the contract the architect's certificate was a condition precedent to the plaintiff's right to recover, but what the plaintiff contends is, that the certificate has been wrongfully withheld. The evidence shews that the work required by the contract had up to the time of dismissal been fully performed. The work which the defendant required to be done was not contemplated by the contract; and at all events was of a most trifling character. The whole difficulty, however, has been caused by the plaintiff having been wrongfully dismissed, and thereby prevented from completing the work, and leave should be granted to add a count for improperly and wrongfully dismissing the plaintiff, and discharging him from the works. This is clearly an amendment within the R. S. O. ch. 49, secs. 7, 8, and ch. 50, sec. 270. The dismissal was wrongful. Not only was no default committed by the plaintiff, but the terms of the 11th condition, under which the dismissal was attempted to be made, have not been complied with. Under that condition there should have been a special authority delegated by the defendant to the architect to dismiss the particular workman complained of, and not, as

here, a general authority ; because the plaintiff, in entering into the contract, relied upon the judgment of the person with whom he was contracting, namely, the defendant, and was therefore entitled to have that judgment exercised. All the evidence which can be had on this point having been already taken under the sixth and seventh pleas, setting up the dismissal of the plaintiff, a verdict can now be entered on the added count ; in any event, there must be a new trial.

March 5, 1880. OSLER, J., delivered the judgment of the Court.

As to the defendant's rule, the question is whether the power of dismissal mentioned in the condition was properly exercised. That power, so far as regards the plaintiff, depends upon the 11th condition only, and before the architect or clerk of the works could enforce it against the contractor it was necessary that he should procure, in the terms of the condition, the special and written permission of the proprietor, which we take to mean a permission deliberately given to be acted upon with reference to some individual contractor, and not a general permission to dismiss anybody or everybody, at the architect's discretion.

The condition also provides that the power of dismissal so acquired shall be exercised only after giving the contractor seven days' notice in writing ; and it was intended, in our opinion, that this notice should intimate to the contractor in what respect the architect was dissatisfied with the conduct of the works, and what he required to be done as regards expedition, material, and workmanship, so that during the time mentioned in the notice the contractor might have an opportunity of removing the architect's objections ; failing to do which, and after the expiration of the seven days' notice, and not before, the architect might dismiss him and employ other persons to finish the works.

The authority given to the architect, and under which he professes to act, was "to dismiss, in his discretion, any workman or contractor in my house in Parkdale." It was

given on the 11th January, and on the 13th January the architect delivered to the contractor the following notice:

"MR. T. SMITH,

"Sir,—In accordance with section 11 of the conditions, which is as follows," setting it out at length, "therefore take notice that you are dismissed from the works, the notice hereof to date from this 13th day of January, 1879.

(Signed) "A. R. DENISON,
 "Architect."

For the reasons which we have already given, we think that the authority given to the architect, and the notice given by him to the plaintiff, were not such as the contract required, and that the plaintiff was, therefore, irregularly and improperly dismissed.

It is not necessary now to decide whether the 11th clause of the conditions could be acted on and enforced after the time limited by the contract for the completion of the work. If it had been necessary to do so, the defendant would probably have found some difficulty in meeting the objection. See *Walker v. London and North-Western R. W. Co.*, L. R. 1 C. P. D. 518; *McDonell v. Canada Southern R. W. Co.*, 33 U. C. R. 313.

The defendant relied also upon the third condition as conferring a general power of dismissal; but that condition in this respect clearly applies to the case of a workman as distinguished from a contractor, and cannot, in our opinion, be invoked against the plaintiff.

The defendant's rule must therefore be discharged.

It remains to be considered whether the plaintiff's rule should be made absolute to any, and if so, to what extent.

The plaintiff seeks to add a count charging a wrongful dismissal, by reason whereof he was prevented from completing his contract and from obtaining from the architect the certificates necessary to entitle him to payment for the work already done by him at the time of dismissal.

We entertain no doubt as to our power under the R. S. O. ch. 49, secs. 7, 8, and ch. 50, sec. 270, to make such an amendment in a proper case. If the defendant had gone to

trial relying upon the plea of never indebted, or upon a plea setting up the absence of the architect's certificate, we should probably have had no difficulty in holding either that the amendment should not be made at all, or at all events only upon the terms of a new trial on payment of the costs of the trial and of the application.

The defendant has, however, set up in his seventh, and to some extent in his sixth plea also, as a defence to the plaintiff's claim, the dismissal by him of the plaintiff in the exercise of the supposed right or power conferred by the contract. This right was, as appears from the exhibits filed, (see exhibits 34 and 37,) a matter in controversy at the time of the commencement of the action. Upon these pleas and the issues thereon, all the evidence was given which, as it seems to us, could by possibility be given upon the proposed count for a wrongful dismissal, or any defences which the defendant could set up to such a count, nor could it be suggested on the argument that any other evidence was forthcoming than that already given. Everything which could be urged by the defendant and his architect as a justification for such dismissal, and in support of his right to do so under the contract, was put forward, and the extent of the plaintiff's claim and the amount payable to him under any circumstances fully appear in the evidence. Had the proposed amendment been asked for at the trial it ought, as it seems to us, to have been made, and the amount due to the plaintiff could have then been readily ascertained.

We think we ought to make the amendment now, and to enter a verdict for the sum the plaintiff may on the evidence be entitled to recover, and we do so because it appears to us from the pleadings and evidence that the defendant cannot be taken by surprise or sustain any injustice from such a decision.

The cases of *Snyder v. Snyder*, 22 C. P. 361, and *Hammond v. Heward*, 20 U. C. R. 36, relied upon by the defendant, are distinguishable upon this ground.

In *Ellston v. Deacon*, L. R. 2 C. P. 20, the defendant was sued upon an acceptance given by his partner in the part-

nership name. The bill included a private debt of the partner who gave the bill. The plaintiff having been nonsuited, the Court permitted an amendment to be made by adding a count for goods sold and delivered to the firm, and entered a verdict for the sum due from the firm, notwithstanding the defendant's objection that if the count had been added at the trial he would have pleaded the non-joinder.

As to the amount for which the verdict should be entered. The plaintiff is not entitled to be paid for extras, for although they were ordered in writing by the architects, and were actually performed, they were not included in the weekly statement as required by the contract, which expressly provides that this shall be done, and that if not so included they shall be deemed part of the work contracted for, and not extra work: *Oldershaw v. Garner*, 38 U. C. R. 37.

We do not see that the contract gives any power to the architect to dispense with either of the requirements of the contract in this respect.

The amount remaining unpaid upon the contract price is \$340. From this sum we deduct \$30, the value of the work remaining unperformed, as stated by Mr. Fowler; the further sum of \$62.65 for deductions properly made, as ascertained at the trial, and also \$101.48 for hardware and blinds—in all, \$194.63; making the balance due to the plaintiff \$145.37, for which sum we direct a verdict to be entered for the plaintiff with a certificate for costs.

The defendant's rule having been discharged, the most convenient way to dispose of the costs is to direct that there shall be no costs of the argument in term to either party.

The plaintiff's rule will be absolute to enter a verdict for \$145.37, with a certificate for costs, and the defendant's rule will be discharged.

WILSON, C. J., and GALT. J., concurred.

Rules accordingly.

SMYTH V. MORTON, ASSIGNEE.

Insolvency—Order for payment of money—Act of 1875, sec. 133.

G. & C., a manufacturing firm, being indebted to plaintiff on a note, gave him, at his request, as security therefor, a chattel mortgage for \$1,500 and interest on certain tools and machinery in their manufactory, containing a covenant to insure and on demand to assign the policy to the plaintiff; but no insurance was effected, and shortly afterwards the property was burned. The mortgagors, however, held an insurance on the chattels in the S. company, which appeared to be invalid, and also one in the W. company, not on the chattels, but on the building in which they were. Some days after the fire, G. & C., with the knowledge that they were insolvent, and within thirty days of being declared insolvent, gave the plaintiffs an order on the W. company for \$675.

Held, that the order was void (under the 133rd section of the Insolvent Act of 1875).

ACTION on the common counts, for money had and received, &c.

Plea: Never indebted.

The cause was tried before Senkler, County Judge, and a jury, at St. Catharines, at the Fall Assizes of 1879.

The action was brought to determine the right to a sum of money under the following circumstances:

It appeared that there was a firm carrying on business as biscuit manufacturers under the style of Girvin & Cook. The firm having become indebted to the plaintiff in the course of their business, and being unable to meet one of their notes, the plaintiff required them to give him security. This they agreed to do, and on 11th June, 1879, executed a chattel mortgage to him of certain machinery and tools in their manufactory, securing the payment of \$1,500, and interest, in eleven months. The mortgage contained a covenant by the mortgagors to insure said chattels against loss or damage by fire, and on demand to deliver and assign the policy to the plaintiff. The said Girvin & Cook did not after the execution of the mortgage effect any insurance on the said chattels. A few days after the mortgage was executed the premises in which the chattels were placed were destroyed by fire.

Although the mortgagors did not effect any insurance

after the mortgage was given, they held four insurances. One in the Commercial Union Assurance Company; another in the Mercantile Insurance Company; another in the Waterloo County Mutual Fire Insurance Company, for \$2,000; and one in the Standard Mutual Fire Insurance Company, for \$1,500. The first two had been assigned to a person of the name of Peter McCulloch, who held a mortgage, and the amount payable under them was received by him. The Standard Mutual Fire Insurance Company declined to pay on grounds which appeared to have been well-founded, as no attempt had been made to enforce payment. The policy in the Waterloo Company was on the buildings, not on the contents. Some days after the fire the mortgagors gave the plaintiff an order on The Waterloo Company for the sum of \$675, which was the subject of this suit. After this order had been given, and within thirty days thereafter, the firm of Girvin & Cook was declared insolvent, and the defendant was appointed assignee. The claim against the Waterloo Company was finally arranged at the sum of \$812, and this amount was lodged in a bank to await the determination of this suit.

The learned Judge directed the jury that this case came under the 133rd and not the 134th section of the Insolvent Act of 1875 : that if the assignment of the debt was made in contemplation of insolvency by the insolvents, and thereby the plaintiff obtained an unjust preference over the other creditors it would be void ; and that the transfer is made in contemplation of insolvency if the insolvent knew, or as a reasonable man ought to know, that the condition of his affairs was such that he would probably, although perhaps not certainly, become insolvent under the Act.

The jury found for the defendant.

In this term, February 4, 1880, *Bethune*, Q. C., obtained a rule *nisi* to set aside the verdict for the defendant, and enter a verdict for the plaintiff.

During the same term, February 17, 1880, *McClive* shewed cause.

Bethune, Q.C., contra.

The arguments sufficiently appear in the judgment.

March 5, 1880. GALT, J.—It was admitted by Mr. Bethune he could not contend that the order was a payment so as to bring it within the 134th section; but he urged that, although it was the transfer of a valuable security under the 133rd section, he was not concluded by the finding of the jury, that the insolvents knew at the time they gave the order or assignment on The Waterloo County Mutual Fire Insurance Company that they were insolvent, because under the authority of *Greet v. Citizens' Ins. Co.*, 27 Grant 121, the plaintiff was entitled as a matter of right to claim the assignment in consequence of the covenant contained in the mortgage to insure and transfer the policy to the plaintiff.

I have carefully read the evidence, and fully agree with the jury in thinking the firm of Girvin & Cook were insolvent when they gave the order to the plaintiff, and that they were aware of that being the case.

The only ground then on which the plaintiff can rely is the equitable doctrine enunciated in *Greet v. Citizens' Ins. Co.*, 27 Grant 121. The present is, however, very different in its circumstances from that. In *Greet v. Citizens' Ins. Co.* the mortgagor had covenanted to insure the mill in which the machinery which had been furnished by a company represented by the plaintiff was placed, together with the machinery, and to assign the policy to the Worswick Engine Company. After the mortgage was executed he did effect insurance by an interim receipt, and before the policy was issued the premises were destroyed. As soon as the fire occurred the Worswick Engine Company notified the insurance company that they claimed the insurance money under this mortgage, and in disregard of this notice the insurance company paid the money to another party. It was held by the Chancellor that the covenant, interpreted by the Act respecting short forms of mortgages, gave an equitable lien, whether there was an actual assignment of the policy or interim receipt or not.

It is to be observed that the machinery, which was the subject matter of insurance, had been furnished on the

agreement that it was to be insured and the policy assigned to the manufacturer. In the present case the mortgage debt had been incurred before the mortgage was given, and the amount secured had no connection with the subject matter of insurance, and no insurance was subsequently effected.

There was, it is true, an existing policy with the Standard Insurance Company which would have covered the property included in the chattel mortgage; but, as I have already shewn, that policy was of no value. The mortgage in the Waterloo County Mutual Fire Insurance Company was on real estate only.

It was contended on behalf of the plaintiff, that as the two other mortgages embraced not only real property but chattels also, and as the whole mortgage money was paid to the mortgagee, it might be considered that, as respects the amount received by him on the personal property, the amount payable on the real property by The Waterloo County Mutual Fire Insurance Company should be treated as substituted. I cannot assent to this. The mortgages in question were of long standing, and the assignment of the policies had been made months before the fire occurred. It appears to me the true position of the parties at the time when the order was given, was that Smyth held a covenant from the insolvents which they had not fulfilled. They held a valid claim on the Waterloo County Mutual Fire Insurance Company, which formed part of their assets, and over which the plaintiff had no lien as he had no interest in the property in respect of which that claim arose, consequently any assignment made to him by them when they were insolvent is void under the 133rd section, they being aware of such being their position, as found by the jury.

WILSON, C. J.—There may in some cases be a substitution by the debtor, with the assent of the creditor, of one security in place of the other; but in this case I do not think the transfer of an order upon the Waterloo County

Mutual Fire Insurance Company's policy could be given by the debtor in lieu of the transfer of the policy which the creditor specially bargained for in his mortgage, because at the time he got the claim upon the Waterloo policy other rights had attached upon it.

I concur in the judgment just delivered.

OSLER, J., concurred.

Rule discharged.

ANCHOR INSURANCE COMPANY v. PHœNIX INSURANCE COMPANY.

Insurance on freight—Termination of voyage by accident—Total loss of freight, claim for—Evidence.

The owner of a vessel had insured it, as also the freight, with the defendants on a voyage from Toledo, U. S., to Kingston, Ont., and the owner of the cargo had insured it with the plaintiffs. During the voyage the vessel sank in the Welland canal, near Port Colborne, and the cargo (15,000 bushels of corn) being damaged, was abandoned by the owner to the plaintiffs. The plaintiffs, desiring to send it to Buffalo instead of to Kingston, applied to the owner of the vessel for possession thereof, offering to pay one half of the freight *pro rata itineris*. To this the defendants objected unless the owner would exonerate them from any liability under their policy, and an arrangement was then made between the owner of the vessel and the plaintiffs, whereby, on the plaintiffs paying full freight, the owner assigned to them the defendants policy on freight and gave them possession of the cargo, which was then taken by the plaintiffs to Buffalo and sold there.

Held, WILSON, C. J., dissenting, that the plaintiffs could not recover against defendants on the policy as for total loss of freight: that the evidence shewed that the cargo was not forwarded to Kingston, not because another vessel could not have been obtained or this vessel repaired, and it would not have arrived there in specie if reshipped within a reasonable time, but because the insurers of the cargo thought it more to their interest, though against the protest of the defendants, to determine the voyage.

Per WILSON, C. J., that the plaintiffs were entitled to recover: that the evidence shewed that the voyage was given up voluntarily by all parties, including the defendants, and the payment of the freight was not in exoneration of the defendants, but was a compulsory payment by the plaintiffs to get possession of their property.

This was an action tried before Osler, J., without a jury, brought by the plaintiffs, as assignees of a policy of insurance on freight.

One McIlwain, the owner of a schooner called The St. Andrews, had insured his vessel with the defendants on a voyage from Toledo, U. S., to Kingston, Ont. He had also effected another policy with them on the freight. The vessel met with an accident in the Welland Canal, and sank. The cargo, consisting of about 15,000 bushels of corn, had been insured by the owner with the plaintiffs. Shortly after the accident happened the agents of the plaintiffs and defendants arrived at the place where the vessel was lying. The agent of the defendants took possession of the vessel and proceeded to unload her into barges. The corn was all wet, and had begun to swell so much as to force open the deck. The owner of the cargo had abandoned it to the plaintiffs. Their agent being of opinion that it was better to take possession of the corn where it then was, and send it to Buffalo in place of having it forwarded to Kingston, applied to the owner to give him possession of the cargo, offering to pay him one half of the freight as *pro rata itineris*. To this the agent of the defendants objected, unless the owner would exonerate the defendants from any claim under their policy. Under these circumstances the owner made an arrangement with the agent of the plaintiffs whereby he assigned to them the freight policy, and they paid him the full freight, and he gave up possession of the cargo. The corn was taken to Buffalo and sold there by the plaintiffs. They then brought this action, contending that under the circumstances, as it would have been impossible to have taken the cargo to Kingston, there was in truth a total loss of freight, and they were entitled to a verdict against the defendants as for such total loss.

The learned Judge delivered the following judgment:—

“The contract between the defendants as insurers on freight, and the Captain or Master of the vessel, was, that the latter should not, by reason of any of the perils insured against, be prevented from earning his freight for the carriage of the cargo. The vessel was sunk in the Welland Canal a few days after, and the cargo consisting of grain, damaged. The master of the vessel had a reasonable time within which to repair his own vessel, or to reship or tranship the cargo so as to earn his freight. If the

goods were so damaged, that they could not, if reshipped within a reasonable time, have arrived at their port of destination, in specie as grain, or if the master could not within said reasonable time, have procured another vessel, or repaired his own, then there was a total loss of the freight, and the insurance became payable, But, if the grain could have been sent forward, so as to have arrived at Kingston as grain, though so damaged as to be worthless, I think the result of the authorities, so far as I have been able to examine them at present, is, that the freight would have been earned, and the defendants, the insurers, would not have been liable. The master does not guarantee, that the goods he carries shall be merchantable, or of any commercial value. He fulfils the bargain on his part as carrier, if without negligence he delivers the articles he has received, though in course of transit they may have become damaged.

"The present action must be looked at in all respects, as if it had been brought by the master. The onus of establishing that there was a total loss of freight lies upon the plaintiffs as his assignees. It was the interest of the plaintiffs, as insurers of the cargo, to get possession of, and sell the grain at the earliest moment possible after the damage at the place where they would be likely to get the best price for damaged grain. Buffalo was a better market for that purpose than Kingston. It was directly contrary to the interest of the defendants, that anything should be done to prevent the master from earning his freight by sending the grain to Kingston.

"I think the evidence falls far short of establishing either that the grain would not have arrived at Kingston in specie, if it had been reshipped within a reasonable time, or that the master could not within such time, have procured another vessel to reship and forward it there.

"I am unable to attach any weight to the evidence of John McIlwain on these points.

"I find against the plaintiffs on both of them. I also find, so far as that is material to this case, that before the plaintiffs carried out the agreement hereafter referred to they had full notice that the defendants protested against it, unless the claim on their policy was abandoned.

"It is plain that the master was not prepared to surrender the cargo to the owner, without having his freight secured or paid to him.

"Then the insurers on cargo, acting for themselves and the owner, require delivery to be made to them of the damaged cargo at a place short of the port of destination. They were not entitled to this except upon payment of the freight in full, in which event there would be no loss of freight, and therefore no claim on the policy.

"No doubt, in the interest of the owners and of the plaintiffs as insurers of the cargo, it was the best and most prudent course to take possession at once and sell the grain at Buffalo. This, however, cannot affect the liability of the defendants as insurers on freight, unless the conditions already indicated existed."

"I think the plaintiffs fail to shew that they did exist, and I therefore enter a verdict for the defendants."

In this term, February 5, 1880, *Maclennan*, Q. C., obtained a rule calling on defendants to shew cause why the verdict entered for the defendants should not be set aside and a verdict entered for the plaintiffs.

During the same term, February 17, 1880, *Robinson*, Q. C., shewed cause.

Maclennan, Q. C., contra.

The arguments and cases referred to sufficiently appear from the judgment.

March 5, 1880. GALT, J.—For the purpose of deciding the point raised in this case we must consider the plaintiffs in the two-fold character as owners of the cargo and owners of the freight.

I have carefully considered the cases cited by the learned counsel on both sides, and I think they establish the law as laid down in the case of *The Soblomsten*, L. R. 1 Ad. & Ec. 293, where the learned Judge says, at p. 297: "By British law the following points seem to me settled:—First, that upon the vessel becoming disabled at an intermediate port, the master is allowed a reasonable time within which to re-ship or tranship, so as to earn his freight. Second, that the whole freight is payable, if by default of the owner of cargo the master is prevented from forwarding the cargo from the intermediate port to its destination. Third, that no freight is payable, if the owner of cargo against his will is compelled to take the cargo at an intermediate port. Fourth, that to justify a claim for *pro rata* freight there must be a voluntary acceptance of the goods by their owner at an intermediate port in such a mode as to raise a fair inference that the further carriage of the goods was intentionally dispensed with."

It is manifest the plaintiffs are now filling two different positions antagonistic to each other. As assignees of the freight they were bound to prove that every exertion had been made to enable their assignors to earn it, and that the loss had arisen from the dangers of the navigation, or that circumstances were such that any exertion would have been useless. In place of this, they not only do not shew they made any exertion whatever, but, on the contrary, they pay the amount of freight to the owner of the vessel to induce him to refrain from making such exertions, by which alone he would have discharged his duty to the insurers. They were anxious to take possession of the cargo, and in order to obtain such possession they pay the freight to the ship owners, he refusing to part with the cargo unless they did so. He has, therefore, sustained no loss. When he received his freight the insurers were discharged.

The case falls within the second proposition mentioned. It was not exactly by default of the owners of the cargo that the master was prevented from forwarding the cargo, but it was by their solicitation he did not attempt to do so, in consideration whereof they paid him the amount covered by the policy of the defendants, which he was by law entitled to demand, if the owner prevented his earning it by forwarding the cargo from the Welland Canal to Kingston. When he received his freight he had no claim which he could enforce under the policy, and consequently he could transfer none to the plaintiffs.

The position of the plaintiffs may be briefly stated as follows: They were the owners of the cargo, and, as such, liable to pay freight to the master if the cargo was delivered at Kingston. They were also in the place of the owners of the vessel, and entitled to receive such freight; but they considered it more for their interest to abandon the voyage than to earn the freight. They can, therefore, have no claim against the insurers, because it was by their own act, and not by the perils of the navigation, that the freight was lost.

This case differs from that of *Notara v. Henderson*, L. R. 5 Q. B. 346, L. R. 7 Q. B. 225, in this important aspect. The defendant in that case was held liable for damage done to a cargo of beans, which had been saturated with salt water, owing to a collision and a subsequent storm, because he insisted on carrying them on in a damaged state from Liverpool to Glasgow; although the owners of the cargo were resident in Liverpool, and were willing to accept the beans at that place and pay freight *pro rata*, the defendant insisting they should pay full freight, and on their refusing to do so he proceeded to Glasgow. It was shewn that the cargo could have been unshipped at Liverpool without difficulty, and at the expense of the plaintiff, and the Court held that defendants had no right to carry on the cargo in the state it was simply for the purpose of earning the freight.

In the case now before us, the owner made the same demand for payment of full freight before he would part with the cargo, and the owner of the cargo paid it. *Notara v. Henderson* would have been the same as the present if the plaintiffs had paid the freight and then brought an action to recover it back. It was not suggested they could have done so. Here the freight insured was actually paid to the insured, and the voyage by mutual consent terminated at an intermediate port; it is therefore within the second position laid down in the case of "*The Soblomsten*," and the master was entitled to demand and receive the freight, which he did.

It appears to me the proper course to have been pursued by the captain in order to fix the defendants with liability under their policy, more especially as their agent was actually present and protesting against the delivery, would have been to have tendered possession of the cargo to him for the purpose of being forwarded, throwing upon the defendants the responsibility of any loss that might have arisen by forwarding it in its then damaged state; but he had no power to hand over the cargo to the plaintiffs, receiving from them his freight in full, and then confer on them a right of action against the defendants as for a total loss of freight.

It must not be forgotten that the plaintiffs had offered to pay the captain one half of the freight, which he refused.

I fail to see how, under these circumstances, he could enable them to charge these defendants as for a total loss.

OSLER, J.—I have been unable, after a careful reconsideration of the evidence, to divest myself of the opinion I formed at the trial, that the cargo was given up and the voyage terminated, not because the captain or master of the vessel was unable to earn his freight, or would not have endeavoured to do so, but because the plaintiffs, as insurers of the cargo, thought it was more to their advantage to put an end to the voyage at Port Colborne, and take the grain there and ship it to Buffalo, than to permit the captain to carry it to Kingston, where there was not so good a market for damaged grain, and where their loss would therefore be greater. So far as the owner of the cargo was concerned it was immaterial, he was fully insured, and his insurers, the plaintiffs, were acting for the best in his interest and their own, more particularly their own.

Looking at this action as one brought by the master, it is for the plaintiffs to make out that there was a total loss of freight.

I am of opinion that they have failed to do so. On the contrary, the evidence, to my mind, establishes that in the interest of owner and insurers of cargo, it was agreed that the voyage should be abandoned and delivery accepted at an intermediate port, the insurers paying the freight, as in that case they were bound to do. This was done without the consent and against the protest of the defendants' agent, so far as it was intended in the dealings between the plaintiffs and the master to assert the defendants' continued liability on the policy on freight.

The matter came to be a contest between the insurance companies, and I am not surprised that Captain Rice, representing the defendants, warned the master of the vessel not to abandon the grain to the owner if he was

looking to the defendants to indemnify him under their policy on the freight.

I am unable to see that Rice did anything more or interfere further than was necessary, or than he had a right to do, as representing the insurers of the hull.

My brother Galt has pointed out the distinction between this case and that of *Notara v. Henderson*, L. R. 5 Q. B. 346, L. R. 7 Q. B. 225, relied upon by Mr. MacLennan.

I think the rule should be discharged.

WILSON, C. J.—This being an action on a policy insuring freight against the dangers of navigation, it is necessary to establish that the freight claimed has been lost by these dangers.

The schooner St. Andrew was on a trip, laden with corn, from Toledo, in the United States, to Kingston, in this province. She struck against the stone work of the Welland Canal, in her passage through it, and sank in fifteen feet of water, some few miles from the entrance of the canal from Lake Erie, not far from Port Colborne. The vessel was raised four or five days afterwards. The defendants' company, by their agent, got pumps, and pumped the vessel, and took the cargo out and put it into lighters, in order to raise the vessel. The grain was all wet; it had burst the deck of the vessel before its removal, and it was warm.

One of the witnesses said the vessel could have been repaired in two or three days sufficiently to have enabled her to take the grain to Kingston.

It was not said how long it would take to reship the grain; probably, it may be inferred, about two days. Then the voyage to Kingston by a tug would have occupied about two days, and to unload it say another day. That would make it in all about thirteen days the corn would have been in the canal and wet from the effect of it before its delivery at Kingston, during all which time these thousands of bushels would be lying in a compact mass, and when not under water would be in close decked vessels.

When the corn was taken from the sunken ship and put into barges in the Welland canal, could it have been reshipped and sent on to Kingston in the same, or in another vessel, and have arrived there *in a state which would entitle the owner of the vessel to the freight?* If it could, then the action must fail. If it could not, then the defendants' policy became payable, because the freight would have been lost by the perils of navigation.

It is assumed, so far, that the St. Andrew could have been fitted up in a reasonable time to enable her to complete the voyage, or that another vessel could have been found in a reasonable time and by reasonable exertions to take the cargo on to its destination.

The question then is, in what state should the cargo be, or be estimated to be at its destination to make the owner of it liable to freight, or to exempt him from the payment of it?

The cases, and I have referred to many of them, shew that if the goods shipped could, after the damage done to them, be capable of being delivered at the port of destination in *specie*, the owner of them is liable for the freight; that is, so that "the species itself would not disappear, and the goods would not assume a new form, losing all their original character:" per Lord Abinger, C. B., in *Roux v. Salvador*, 3 Bing. N. C. 266.

If flax could be delivered at its destination as flax, though deteriorated in value: *Davy v. Milford*, 15 East 559; or if hides could be delivered, at the end of the voyage, as hides, freight would be payable: *Roux v. Salvador*, 3 Bing. N. C. 266; or silk as silk: *Navone v. Haddon*, 9 C. B. 30; or wheat as wheat: *Rosetto v. Gurney*, 11 C. B. 176; *Farnworth v. Hyde*, L. R. 2 C. P. 204; or corn as corn: *Reimer v. Ringrose*, 6 Ex. 263; *Thompson v. Royal Exchange Ass. Co.*, 16 East 214; or in a merchantable, although a very damaged state: *Tronson v. Dent*, 8 Moo. P. C. 419. But not if the goods, although in *specie*, subsist only in the form of a nuisance, and are not utterly annihilated: *Cologan v. London Ass. Co.*, 5 M. & S. 447; *Roux v. Sal-*

vador, 3 Bing. N. C. 266; nor if they would be worth nothing at their destination, although existing in specie: *Parry v. Aberdein*, 9 B. & C. 411; *Gernon v. The Royal Exchange Ass. Co.*, 6 Taunt. 383; *Parsons* on Mar. Ins., vol. ii, p. 156; *Vlierboom v. Chapman*, 13 M. & W. 230; *MacLachlan* on Merchant Shipping, 2nd ed., 399; nor if it would be dangerous to carry them, and the cost of making them safe would be too great: *Michael v. Gillespy*, 2 C. B. N. S. 627.

It is the duty of the master to carry the goods to their destination if he can deliver them in a marketable condition. If they are damaged by the sea, and the vessel put in at an intermediate port, he must nevertheless carry them on to their journey's end, unless they would arrive there utterly worthless, by losing their original character and species. If at such intermediate port, by perils of the sea, the goods are found injured, the master must take reasonable means to unload and dry them, if the goods are worth the expense; and he must delay his ship a reasonable time for the purpose, but not to the prejudice of his owners, nor to the prejudice of the other owners of goods on board, so as to prevent further deterioration of the goods; and if he do not do so when he might, the owner of the ship is answerable in damages for such neglect of the master: *Notara v. Henderson*, L. R. 5 Q. B. 346, in the Ex. Ch., L. R. 7 Q. B. 225; *Rosetto v. Gurney*, 11 C. B. 176.

It is very clear the shipowner must carry the goods to their destination to entitle himself to freight, or be able and willing to do it. But if he be prevented by the freighter from doing so, when he can and is willing to do do it, he is entitled to his full freight. Freight *pro rata itineris* is unknown to the common law, and is the subject only of special agreement: *MacLachlan* on Merchant Shipping 2nd ed., p. 445, and all the cases shew it can be enforced or set up only by express contract.

In this particular case there was a very great deal of evidence which shewed the grain after the perfect saturation it got, and the fermentation which had begun, allowing for unloading and repairing the schooner, or

finding another to take its place, reloading and carrying to Kingston, could not have been delivered at the place of delivery as corn, but that it would be rotten or worthless. The owner, the master of the vessel, Mr. Graham, the agent at St. Catharines of the plaintiffs, and Mr. Walmsley another agent of the plaintiffs, all expressly gave that as their opinion.

I am not able to say, even although the close package of it under hatches of the vessel from Port Colborne to Kingston for three or four days in its wet, heated, and fermented state would so far have changed the nature of the article as to have given it another character, or have rendered it worthless.

If it had been converted into malt, or had been fit only for hog feed, it may be the species would have been changed. Because the shipment was of corn, and the delivery should have been of corn, even although damaged and lessened in value.

Perhaps I should have adopted the opinion of the witnesses I have named, which is, I think very strongly supported by Capt. Rice's evidence, the agent of the defendants. But the learned Judge did not do so, and I am not prepared to set up my opinion against his, as he saw the witnesses and had a better opportunity of judging between them in their conflicting evidence.

As to the ability or willingness of the master or parties to find a vessel. There is some reason to believe that the defendants' agent, Captain Rice, took possession of the schooner. The owner said, Captain Rice "had full control of everything; he took charge; he was running everything; he was working it to the best advantage of all concerned; he took charge of it; he came there as agent of the Phoenix Insurance Company to take charge, as I told you, for the benefit of all concerned."

Mr. Walmsley said: "Captain Rice had charge of the vessel. * * It was decided by all parties, Captain Rice and all, that in the interest of all parties the best thing to do would be to send the cargo to Buffalo." Captain Rice

got steam-power barges and men to unload, and raise the vessel. He took her to the defendants' dry dock at Port Robinson to be surveyed, then he took her to St. Catharines. We did not consider ourselves in charge because we did not accept the abandonment. The Captain took her to Port Robinson; he was in charge virtually. I superintended the thing, but the captain of the vessel was there. We delivered her back to the owner at St. Catharines. We made no repairs only stopped the leak. * * I never interfered with the captain's control of the vessel."

Now it appears to me, in the first place, very doubtful if a vessel could have been got at all, and I am quite convinced, by the perusal of the evidence, that it was the intention and desire of all parties not to carry on the grain to Kingston. When I say of all parties, I mean Captain Rice, as agent of the defendants, the Captain and the owner of the vessel, and Mr. Walmsley, the agent of the plaintiffs. There was not one of them spoke of or contemplated such a thing, and not one of them looked for or thought of looking or enquiring for a vessel, and situated as Captain Rice then was, in charge of the vessel, by the defendants' insurance on the hull, and representing them also as interested in carrying the cargo to Kingston so as to avoid the payment of the freight, they had insured, it was much more his duty to find a vessel or to repair the St. Andrew, or to propose doing one or the other, than it was the place of the plaintiffs. The whole object of the parties was to determine the voyage there and then, and by compulsion to make the plaintiff pay the freight in full, which had not been earned, and which the defendants had no concern to see earned so long as they could escape from payment of it by casting it upon the plaintiffs. And the refusal by Captain Rice, and, at his instigation, by the captain of the vessel, to deliver up the cargo to the plaintiff was not because they wanted or wished or intended to carry the grain on, but to compel the plaintiffs to pay the freight, which the other parties

knew they could force them to do by the mere withholding of the cargo from them, which was damaging every day the delivery was delayed.

In my opinion, then, the voyage was given up by all parties. There was no effort made or intention entertained by any one to complete the voyage. The payment of the freight by the plaintiffs was a compulsory payment, without merit, value, consideration, or service performed. The plaintiffs paid it merely to get possession of their property, which was unjustly withheld from them. They paid it, not in exoneration of the defendants, but in purchase of the shipowner's remedy on his policy against the defendants, as testified by their taking an assignment from him of his claim for the freight; and under that assignment, for the reasons just given, I think they are entitled to recover their demand against the defendants.

The duty of a shipowner, and the rights of the shipper, are plainly stated in *Hunter v. Prinsep*, 10 East 378, by Lord Ellenborough, C. J., at p. 394: "If the ship be disabled from completing her voyage, the shipowner may still entitle himself to the whole freight by forwarding the goods by some other means to the place of destination; but he has no right to any freight if they be not so forwarded; unless the forwarding be dispensed with, or unless there be some new bargain upon this subject. If the shipowner will not forward them the freighter is entitled to them without paying anything. One party, therefore, if he forward them, or be prevented or discharged from so doing, is entitled to his whole freight; and the other, if there be a refusal to forward them, is entitled to have them without paying any freight at all. The general property of the goods is in the freighter; the shipowner has no right to withhold the possession from him, unless he has either earned his freight, or is going on to earn it. If no freight be earned, and he decline proceeding to earn any, the freighter has a right to the possession."

See also *Maclachlan on Merchant Shipping*, 2nd ed., p. 399.

It is very true the plaintiffs must now, in some respects, be treated as bound by the master's conduct, they being the assignees of his rights. But, in my opinion, it was Captain Rice who controlled the ship and the master, and the cargo too; and it thus became his duty to deal with the cargo as the master should have done properly if left to his own judgment. But it is also, as before stated, a very material consideration whether the voyage was not, by all parties, voluntarily abandoned. As I have already said, I think it was.

I think the rule should be made absolute to enter the verdict for the plaintiffs for the amount claimed.

Rule discharged.

THE CANADIAN BANK OF COMMERCE V. GURLEY ET AL.

Promissory note—Consideration—Antecedent debt.

Held, that an antecedent debt is a good consideration for a note transferred as collateral security for the debt, so as to enable a *bona fide* holder without notice to enforce it, though void for illegality as between the maker and payee.

ACTION on a promissory note, made by the defendants on the 11th of March, 1879, payable "to the order of Warring Kennedy, Receiver Rooney Estate," for the sum of \$486.28, at three months, endorsed by Kennedy to the plaintiffs.

Pleas:

1. This plea was struck out.
2. Payment.
3. Plaintiffs not the holders.
4. That before the making of the note Warring Kennedy had preferred, before the Police Magistrate for Toronto, a charge against the defendant George Gurley, of fraudulently and feloniously embezzling a certain sum of money, and after the charge had been preferred it was agreed between the defendants and the said Kennedy, that in consideration of Kennedy consenting to withdraw the charge, and abstain from prosecuting the same, the defen-

dants should give to him the said promissory note: and that the said note was made on the said consideration, and was delivered by the defendants to the said Kennedy in pursuance of the said agreement, and the said charge was thereupon withdrawn; and that the said note was endorsed and delivered to the plaintiffs by the said Kennedy, and the plaintiffs always held the same without any value or consideration.

5. Similar to the fourth, down to the charge being abandoned, and concluding as follows: And that upon maturity of the note, the amount thereof was paid by the said Kennedy to the plaintiffs, and thereupon the plaintiffs ceased to be beneficially interested in the same, and the said Kennedy became entitled thereto; and the plaintiffs thence thereafter held the same for and on behalf of the said Kennedy, and are suing in his interest.

6. Similar to the fourth plea, but concluding that the plaintiffs had notice that the said note was made upon such illegal consideration when the note was first endorsed to them.

7. Similar to the fourth plea, but concluding that Kennedy endorsed and delivered the note to the plaintiffs when it was overdue.

8. Plea of coverture, by Mary Gurley.

Replication:

1. Issue on pleas.

2. To the eighth plea, that Mary Gurley had and has separate estate.

Issue.

The cause was tried at the Chancery Sittings held at Toronto, in the fall of 1879, before Proudfoot, V. C.

A great deal of evidence was taken, and the learned Judge gave a written judgment, in which he stated the main circumstances in the case, and he stated the question to be: "Whether a preceding debt alone is a good consideration for a note transferred as collateral security for the debt, so as to enable the holder to enforce it, though void for illegality as between the maker and payee?"

The question presupposes the endorsee had no notice of the illegality at the time they took the note; as the learned Judge expressly found that "no evidence was given to prove notice."

The learned Judge, after a careful review of many authorities, chiefly American, concluded as follows: "In the present case, I am unable to imagine anything in the nature of a consideration for the note. The plaintiffs made no advance upon the faith of it. They gave no forbearance because they had received it. They incurred no liability by accepting it. They did not accept it on account, or as conditional payment, and they suffer no loss by failing to recover upon it, as they are otherwise amply secured.

"I therefore think they cannot recover, and that the verdict must be for the defendants."

In this Term, February 5, 1880, *Ferguson*, Q.C., obtained a rule, calling on the defendants to shew cause why the verdict should not be set aside, and a verdict entered for the plaintiffs for the amount claimed.

In the same term, February 17, 1880, *Ritchie* shewed cause. The evidence establishes conclusively that the note sued on was founded upon an illegal consideration, viz.: the abandonment of legal proceedings commenced against the defendant George Gurley, and the fact that the amount of note may have been actually owing by him can make no difference as regards the validity of the note: *Williams v. Bayley*, L. R. 1 H. L. 200; *Canada Farmers' Mutual Insurance Co. v. Watson*, 25 C. P. 1; *Doyle v. Carroll*, 28 C. P. 218; *Toponce v. Martin*, 38 U. C. R. 411; *Watts v. Mitchell*, 26 Grant 570. The note being void as between the original parties, the plaintiffs can stand in no better position than Kennedy, from whom they received it. Illegality in the original consideration being proved, the onus rests on the plaintiffs to establish that they are holders for value: *Hall v. Featherstone*, 3 H. & N. 284; *Harvey v. Towers*, 6 Ex. 656; *Hogg v. Skeen*,

18 C. B. N. S. 426; *Jones v. Gordon*, L. R. 2 App. 617, 628. The evidence shews that the plaintiffs are not properly transferees of the note. If they were entitled to demand the note as of right, then there could be no consideration for the transfer. If the note was one of the assets of the Rooney Estate, then Kennedy could not transfer it to the plaintiffs to the other creditors' prejudice, and plaintiffs must be regarded as holding it in trust for the receiver. The mere fact of taking a note as collateral security for a pre-existing debt does not constitute the plaintiffs holders for value. The plaintiffs did not ask for the transfer of the note, nor did they pay anything for it or release any right. The test to ascertain whether plaintiffs are entitled to recover is *whether they hold for value*, and not whether they hold for value *or as collateral security*; and although it may be true that a note held as collateral security for a pre-existing debt is in most cases found, upon enquiry, to be held for value, yet, in a case like the present where it is clearly shewn that every element of consideration is wanting, the plaintiffs must fail. The legal presumption is, that plaintiffs are not holders for value, and this legal presumption cannot be met by a counter presumption, that a note held as collateral security is necessarily held for value. To constitute a valuable consideration there must be some damage or detriment to the transferee, or some benefit to the transferror. In this case there has been neither. The plaintiffs gave nothing for the note; there was no express or implied agreement for forbearance; no responsibility assumed on taking the note, as it was endorsed "without recourse;" and no change whatever in the legal rights of the plaintiffs. It cannot even be said that plaintiffs were " lulled into security," as George Gurley was insolvent and they had already proved against his estate, as also against the Rooney estate, for the full amount due. The cases would shew that there cannot be a recovery on proof merely that the note is held as collateral security for a pre-existing debt without shewing further, some sufficient consideration for the transfer: *Solomons v. Bank of England*, 13 East 135, note; *De la Chaumette v. Bank of England*,

9 B. & C. 208. In *Currie v. Misa*, L. R. 10 Ex. 153, L. R. 1 App. 554, which is relied on by plaintiffs, the cheque was not transferred as collateral security, but on account of the debt, and was credited by the plaintiffs and operated as a conditional payment. The cases in the Supreme Court of U. S. are also relied on by plaintiffs, but in none of them did the point in question expressly arise, and, upon examination of them, it will be found that there was in each a valuable consideration. In New York it has been expressly decided that a holder of a note as collateral security is not a holder for value unless an agreement for forbearance be proved: *Stalker v. McDonald*, 6 Hill N. Y. 93; *Merchants' National Bank of Syracuse v. Comstock*, 55 N. Y. 24; *Atlantic National Bank of New York v. Franklin*, 55 N. Y. 235, 238. See, also, *Bowman v. VanKuren*, 29 Wis. 209, 219; *Atkinson v. Brooks*, 26 Vermont 569, per Redfield, C. J. Here there was no pre-existing debt. But even where a note is given as collateral security for a pre-existing debt due by a third party, some valuable consideration must be proved: *Crofts v. Beale*, 11 C. B. 172; *McGillivray v. Keefer*, 4 U. C. R. 456.

Ferguson, Q. C., contra. The note sued on represents a debt actually due by the defendant George Gurley to the Rooney's, and in some of the older authorities it has been held that where this is the case the note cannot be avoided, although more recent decisions appear to be against this view. Even if the note could not be enforced as between the original parties, the plaintiffs, who are transferees without notice or knowledge of the circumstances under which it was obtained, are entitled to recover. There was a pre-existing debt due from the Rooney's to the plaintiffs, and Kennedy, as receiver of the Rooney estate, having transferred the note as collateral security to the plaintiffs for such debt, they must be treated as holders for value. Kennedy, as receiver, had authority to transfer the note, and did absolutely transfer it to the plaintiffs; and it is immaterial whether he so transferred it because he thought plaintiffs were entitled to it, or because he wished to secure

the plaintiffs in respect of the debt on the Gurley paper endorsed by the Rooney's. In either case the plaintiffs were properly transferees, and are entitled to recover on the note so long as the debt for which it was security remains unpaid. Where there is a pre-existing debt, and the note has been transferred as collateral security for such debt, it must be assumed that the transferee is a holder for value. Upon such a transfer the holder acquires an interest in the note, and assumes the responsibility of making the note his own. This is of itself a sufficient consideration, and the Court will not inquire whether, in the events which have afterwards happened, the holder has or has not suffered damage. The authorities in the Supreme Court of the United States expressly shew that a pre-existing debt is alone a sufficient consideration for the transfer of a note, and that a person holding a note as collateral security for such debt must be regarded as a holder for value : *Swift v. Tyson*, 16 Peters 1; *Goodman v. Simonds*, 20 Howard 343; *McCarty v. Roots*, 21 Howard 432. In *Daniel* on Negotiable Instruments, 2nd ed., vol. i., pp. 677-683, secs. 829-831, where all the authorities are reviewed, in sec. 831 the result is said to be that the becoming a party to a bill or note is in itself a sufficient consideration for the transfer. See also *Maitland v. Citizens National Bank of Baltimore*, 40 Maryland 540; *Meadow v. Bird*, 22 Georgia 246. The case of *De la Chaumette v. Bank of England*, 9 B. & C. 208, relied on by the defendants, is not in point. There the note was endorsed over for collection, and the holder was merely the agent of the person who transferred it to him. It is not necessary, in order to entitle plaintiffs to the position of holders for value, that there should have been any express or implied agreement for forbearance: *Currie v. Misa*, L. R. 10 Ex. 153.

March 5, 1880. WILSON, C. J.—I do not think it can be necessary to do more than refer to the latest decision on the point in *Currie et al. v. Misa*, L. R. 10 Ex. 153, in the Exchequer Chamber, and which I find to have been affirmed

in the House of Lords in L. R. 1 App. 554. In that case the plaintiffs were the bearers of a cheque made by the defendant, payable to F. de Lizardi & Co., or bearer. Lizardi sold to the defendant in Spain bills amounting to £2,000 sterling. Lizardi gave to the plaintiffs an order, which he drew on the defendant, to pay to the plaintiffs that sum, which was a security for so much of the plaintiffs' general account against them. Afterwards the defendant's manager in London drew a cheque for that sum in the defendant's name, payable to Lizardi & Co. or bearer, and sent the same to the plaintiffs, and got from the plaintiffs the order Lizardi had given upon the defendant, and the plaintiffs then gave credit to Lizardi & Co. in their books for that cheque. The defendant's manager, when he gave the cheque to the plaintiffs, payable to Lizardi, did not know Lizardi was insolvent, and he gave notice to the bankers on whom the cheque was drawn not to pay it, which accordingly they refused to do. The bills Lizardi had sold to the defendant were refused payment by the drawee in Spain.

The defendant contended there was a total failure of consideration for the cheque, by reason of the drawee in Spain, upon whom Lizardi had drawn, having refused to accept the bills which Lizardi had sold to the defendant; but the Chief Baron, who heard the cause, directed the jury to find a verdict for the plaintiffs.

The Court of Exchequer afterwards refused to grant a rule to shew cause. The case was carried to the Exchequer Chamber, and there Lush, J., gave the judgment of the Court for himself and Keating, Quain, and Archibald; Lord Coleridge dissenting.

Lush, J., said, p. 160: "The material plea is the fifth, which alleges there never was any consideration for the defendant's making or paying the cheque, and that the plaintiffs have always held the same without giving any consideration. We think it must be assumed on the facts stated in the case that if the action had been brought by Lizardi, the defendant would have had a good answer to it, on the ground either of fraud or failure of consideration, it matters

not which. The only question therefore is whether, under the circumstances stated, the plaintiffs are to be considered the holders of the cheque for value. * * * The argument before us, however, was addressed almost entirely to the broader question, namely, whether an existing debt formed of itself a sufficient consideration for a negotiable security payable on demand, so as to constitute the creditor to whom it was paid a holder for value. As this is a question of great and general importance, and as our opinion upon it is in favour of the plaintiffs, we do not think it necessary to say more with reference to the special circumstance adverted to, than that we are not prepared to dissent from the view taken upon this question by the Court below. It will, of course, be understood that our judgment is based upon what was admitted in the argument, namely, that the cheque was received by the plaintiffs *bona fide* and without notice of any infirmity of title on the part of Lizardi. * * * The true reason is that given by the Court of Common Pleas in *Belshaw v. Bush*, 11 C. B. 191, as the foundation of the judgment in that case, namely, that a negotiable security given for such a purpose is a conditional payment of the debt, the condition being that the debt revives if the security is not realized. * * * For these reasons we are of opinion that a creditor to whom a negotiable security is given on account of a pre-existing debt holds it by an indefeasible title, whether it be one payable at a future time or on demand, and that, therefore, the judgment of the Court below must be affirmed."

The case was affirmed in the House of Lords; but there the House was of opinion there was no fraud or failure of consideration against or towards the defendant by Lizardi, as he sold the bills which he had no reason to believe would not be accepted.

It is needless to go further. The rule must be made absolute awarding the *postea* to the plaintiffs, with damages assessed at \$486.28, and interest at six per cent. thereon from the 14th of June to the 29th of November.

Rule accordingly.

THE DOMINION BANK V. BLAIR ET AL.

Bond—False representation as to contents—Omission to read over—Evidence—Negligence.

To an action on a bond against the defendants, as the sureties of one F. for his liability to the plaintiffs on a running account, the bond being a continuing security until countermanded by defendants by notice in writing, the defendants, who, by their own shewing, had never taken the trouble to read over the bond although they had every opportunity of so doing, set up that they were induced to execute it by the false and fraudulent representation of the plaintiffs' agent that it was merely a renewal for another year of a previous bond for that period, for the same purpose, to which the defendants were also parties. The agent denied any such representation, and it appeared that he could have had no object in obtaining the bond, as defendants were already liable on the previous bond, which the plaintiffs, could immediately have enforced :

Held, under these circumstances, and on the evidence, more fully set out below, that there was no sufficient evidence of any such false representation ; and that the plaintiffs were entitled to recover.

Semble, that defendants, by their own negligence, had precluded themselves from such defence.

ACTION upon a bond, dated October 8th, 1873, made between one Fowke, of the first part ; the defendants Blair, Hall, and Hudson, of the second part; and The Dominion Bank, the plaintiffs, of the third part : reciting that, in consideration of advances made and to be made by the Dominion Bank to Fowke, the defendants jointly and severally agreed with the Bank that they would be responsible, answerable, and liable to the Bank to the extent of \$10,000, in gold coin, as a continuing liability for Fowke for advances of money made or thereafter made to Fowke, for all cheques then or thereafter drawn by Fowke, payable or indorsed to or held by the Bank, for all drafts, promissory notes, or bills of exchange then or thereafter made, drawn, accepted, or indorsed by Fowke, and whether discounted by the Bank or held only as collateral security by the Bank, and whether originals or renewals, and for all debts of Fowke to the Bank, of whatever kind or nature, and also for all direct and indirect liabilities of Fowke to the Bank, and whether then existing or thereafter created. And the plaintiffs aver that they made advances and dis-

counted notes, &c., of Fowke to a large amount, viz.: \$65,000, which notes, &c., were dishonoured, and are still held by the plaintiffs, and Fowke became directly and indirectly liable to the Bank for a large sum, viz.: \$80,000; and all conditions were fulfilled, &c.

The only pleas necessary to be given are:—

1. *Non est factum.*
4. That the defendants were induced to execute the alleged deed by the fraud of the plaintiffs.
7. On equitable grounds: that about one year prior to the date of the alleged deed the defendants, at the request of the said Fowke and the plaintiffs, by a certain letter of credit, undertook to be answerable and responsible to the plaintiffs, to the extent of \$10,000, for all moneys to be advanced by the plaintiffs to the said Fowke within one year from the date thereof: that about the time of the expiration of said period of one year from the date of said letters of credit, the plaintiffs and the said Fowke applied to the defendants to renew the said letter of credit for the further period of one year, and it was thereupon agreed between the plaintiffs and the defendants that the said defendants should execute a deed, as sureties, to the extent of \$10,000, for the said Fowke, to the said plaintiffs, for the payment of moneys to be advanced by the plaintiffs to the said Fowke within the period of one year thereafter, and not otherwise, and the deed in the declaration mentioned was prepared at the instance of the plaintiffs for the purpose of carrying said agreement into effect, and was executed by the defendants upon the understanding and belief that they were only to be responsible thereunder in respect of advances to be made by the plaintiffs to the said Fowke within the period of one year thereafter: that after more than one year from the date of said deed had elapsed the defendants discovered for the first time that by mistake the said deed did not provide that the defendants' liability should be limited to advances to be made by the plaintiffs to the said Fowke within one year from the date of said deed.

And the defendants say that by reason of such mistake the said deed did not truly express the agreement of the parties intended to be expressed thereby: that, immediately upon discovering such mistake, the defendants notified the plaintiffs of the same and informed them they would no longer hold themselves responsible as sureties under the said deed, and requested the plaintiffs to take steps to collect from the said Fowke the amount then due to them, and thereupon the plaintiffs stated to the defendants that they (the plaintiffs) would without delay collect from the said Fowke the amount due to them and apply the amounts received from him in reduction and discharge of any liability of the defendants under said deed, and defendants, relying upon such statement of the plaintiffs, took no steps to formally put an end to their liability under said deed. And defendants further say, that the whole of the indebtedness and liability of the said Fowke to the plaintiffs, due or becoming due at the time the defendants notified the plaintiffs of such mistake had been fully paid and satisfied by said Fowke before the commencement of this action.

The case was transferred from the Lindsay Assizes, and tried at the Chancery Sittings at Whitby, in May, 1879, before Proudfoot, V.C.

The evidence given at the trial, so far as material to the present enquiry, was as follows:—

The bond or indenture was put in. By it the defendants covenanted as in the declaration stated, and that it should continue as "a continuing guarantee until countermanded in writing, signed by the parties of the second part," (the sureties) "and delivered to the cashier of the bank at Toronto, and shall not be countermanded by the death of any of the parties hereto of the second part until written notice, signed by the survivors or the legal representatives of such deceased party or parties, is given to said cashier."

J. W. Fowke stated: That in 1872, McClellan, the agent of the plaintiffs at Oshawa, proposed that he should get a bond from the defendants for \$1000 to continue for one year: that when this bond expired McClellan wanted

a renewal, and to have it a continuing security : that he, witness, objected and stated there was no necessity for a bond, and that the defendants would not consent to sign a continuing guarantee, and that he could not ask them to do it : that Blair had objected to signing the first bond, and he felt satisfied he would not sign a continuing security. McClellan got the present bond prepared. He did not remember speaking to Hall or Blair about renewing it. He did speak to Hudson at McClellan's request about renewing for another year. The bond was shewn to him by McClellan. He did not read it over, nor was it read over to him. In answer to the question, "What did you understand was the contents of the bond ?" he said, "I understood, over and over again, that it was a simple renewal of the first bond ; and I asked Hudson to sign it on that understanding." In another part of his evidence he said, he never consented to sign a bond for longer than one year. Q. "When did you first become aware of the contents of the second bond ?" A. "I did not know of the contents until this suit was commenced. I supposed until then that it was a renewal of the other." (This suit was commenced on 15th January, 1879.) He also said : "I think I signed the bond two years and-a-half after I heard it was a continuous bond." Q. "You think you signed the second bond two years and-a-half after you heard it was a continuous bond : after Mr. Kane had told you it was a continuous bond ?" A. "I did." He also said that he and Blair had an interview with the inspector in 1876, when Blair told the inspector he had thought the bond was the same as the first, and if he, the inspector, thought he, Blair, was liable, to collect at once.

Hudson said, he signed the bond at Mr. Fowke's request, and that none of the officers asked him to do so or said anything to him of the tenor of the bond : that Mr. Fowke said he wanted the bond renewed, and the bank wanted it renewed : that he thought it was for a year : he did not read it—he cannot read—nor was it read to him ; nor did he ask any one to read it over

to him. If it had been read over he did not think he would have signed it. He would not have signed it. He would not at any time have signed a continual guarantee for Fowke. He had no suspicion that this was a new guarantee with new terms. He thought it was a renewal of the former one. He did not remember that McClellan said anything, but he was not sure he did not state the terms of the bond : that he signed it without knowing its contents because he thought it was a renewal of the other bond. He was willing to become guarantee for another year. He had no idea but that the bond was for another year.

Hall said : that Mr. McClellan, the then manager of the branch at Oshawa, asked him to sign the bond, stating that the former bond had expired, and the bank and Mr. Fowke wished it renewed for another year ; and that it was the same as he, witness, had signed the year before, and that it contained the same words: that he, witness, did not read it nor was it read to him. Q. "Why did you not read it over, over?" A. "Because he told me it was the same bond as the other, and I was in a hurry to get home. I had no suspicion the bond was for a time longer than a year. I heard first in the fall of 1876 the bond was for longer than a year. I talked to Mr. Blair about it a month or so after I heard it. I don't think I would have signed it if I had known it was a continuous bond." He also said he signed the first bond because Mr. McClellan said it would be a great accommodation to Fowke and his wife : that Fowke never asked him to do so ; and when he signed it he told Fowke of it, who thanked him for doing it.

Blair stated he recollects signing the bond now in question. He said that McClellan told him the first bond had expired, and that he wanted it renewed. "I told him I did not think I could do it. He said it would look wrong if I did not. I then told him I would consider over the matter. I did not sign the bond at that time. Afterwards I saw Mr. McClellan in Oshawa, I think I met him on the street. He called me into the bank and pressed me to sign the bond." In answer to the question "What did he say to

you?" witness said: "He still made out it would be all right; and, as I did not think I was running any risk, I signed the bond. He said if I did not sign it the others would not. It was in his presence I signed it. Nothing was said to lead me to believe that it was a continuous bond or liability; and I only signed it as being a renewal for another year. I am not positive where I signed it. I think I signed it in Mr. Fowke's office. It was not read over to me. I understood it was simply a renewal for another year. I do not think I would have signed it if I had known that the bond was continuous."

He further said that he first heard the bond was continuous in 1876, though he was not quite sure of it: that he then told Mr. Kane, the inspector, that if he considered him holden on the bond he wanted it collected at once: that he did not give notice before because he did not know he could give notice of stopping the bond: that he thought he told Kane that he understood the bond was only for a year.

In cross-examination he said: "My impression is that I signed it in Fowke's store, but I will not swear to that positively. I think it was in the store." Q. "Who was present when you signed it?" A. "I do not recollect. My impression is that Mr. Fowke was present. I recollect writing my name to the bond quite well." Q. "Cannot you tell me where you signed this bond?" A. "No; but I am satisfied I did sign it. I was caught in a trap by not reading it." Q. "Did you ever ask any one to read it to you?" A. "No; and I know that I did not read it over myself." Q. Why did you not ask some one to read it over to you?" A. "Because I did not think but that it was on the same terms as the last bond." Q. "Are you quite clear as to your conversation with Mr. McClellan?" A. "I think I am." He stated that McClellan said, "It was a renewal of the bond for another year. I am quite sure of that."

McClellan said he was agent of the defendants when both bonds were executed. As respects the second bond,

that now in question, he said: "All my recollection about it is that at this time the first bond had matured, and the bank wanted it renewed: that the bank required payment, and wanted some security for it. I thought it was my duty to inform Mr. Fowke. I think it was before the first bond matured." Q. "Did you have any conversation with Hall or Blair before the second bond was signed?" A. "No. I made no representations to get the men to sign the bond. I may have told Blair that if Fowke's affairs were all right he would be safe in signing it." Q. "Did you read the second bond?" A. "I did." Q. "Did you make any representations as to the contents of this second bond to Mr. Blair or the other surety?" A. "I have no recollection of making any representations, or speaking to any of them in reference to the second bond." Q. "You held out no inducements for them to sign the bond?" A. "No. I had no object in doing so." Q. "Did you request either of them to sign it?" A. "I have no recollection of doing so. I might have said to the others that it would be a good thing for Fowke if they signed it." Q. "When the bond was before you did you read it and understand the terms of it?" A. "Yes." Q. "Did you make any statement of the terms of the bond to Blair that it was not continuous?" A. "I feel confident that I did not." Q. "Did you make efforts to get the security, or ask them to sign the bond?" A. "No. The bank was in no better condition after it was signed than before. I had no conversation with either of them as to their signature." Q. "Did you have any conversation with Blair in which he stated he was not willing to sign the bond if it was continuous, or have you spoken to him about Fowke's affairs?" A. "I have often spoken to him about Fowke's affairs. He refused the first time to sign the second bond, but the second time I saw him he had signed it." Q. "He says that the first time you pressed him to sign it and he refused, and on the second occasion you pressed him again and he signed it?" A. "I do not see that I could approach him in reference to getting him to sign the bond." Q. "He says that he met you on the street, and in conver-

sation you spoke of the bond, which you wanted him to sign, and he refused to do so, but by your pressing he did it?" A. "I may have met him on the street, and I may have asked him if he would go and sign the bond as the others had signed it. I have no recollection of telling him this bond was the same as the other." Q. "Is it possible that you told him this second bond was the same as the last, only for a year and a day?" A. "I could not, unless I told him a deliberate lie." Q. "Had you any desire to get him to sign it, or any idea of misleading him in getting him to sign the second bond?" A. "No. I thought it would be better for the parties signing it to get the bond renewed. This second bond the parties get away from, by giving notice at any time?" Q. "Did you point that out to any of the parties signing?" A. "I cannot say that I did point it out to them. I remember speaking about it, but it is so long ago I don't remember much about it." Q. "You never misled them on the subject?" A. "No." Q. "Hall says that you requested him to sign the bond. Did you?" A. "No." Q. "Had you any motive in getting the bond signed?" A. "No. I don't recollect any conversation with Hall." Q. "What became of the first bond?" A. "I think it was given up to Fowke on this bond being properly signed."

Kane, the inspector, said: "The first interview of any account that I remember, was about the bond when Blair came in." Q. "You were a witness to the bond which has the signature of Fowke?" A. "Yes." Q. "Do you recollect him signing it?" A. "Yes, I got him to sign it." Q. "When was that?" A. "I find it was in November, 1876." The witness stated also that Fowke did not read the bond. He spoke of the interview with Blair, when Fowke and Blair were together, and thought it was in February or March, 1877: that Blair said he would as soon have the amount of the bond collected, as Fowke was getting bad; but he did not question his liability.

The learned Vice-Chancellor delivered the following judgment:—

"It appeared that there had been a bond executed by the defendants to the Bank, in 1872, similar in terms to that now sued upon, except that the liability of the sureties was only to cover the transactions of one year."

"The defendants say, that the bond now in question was executed by them under the belief that they were renewing the bond of 1872 for another year only: that they never intended to execute a continuing security, and would not have done so had their attention been called to it—they would never have signed this bond: that Mr McClellan the agent of the Bank, asked them to sign this as a renewal of the former.

"The evidence with regard to the circumstances attending the execution of this bond is confined almost entirely to that of the defendants themselves, and of the debtor Fowke; McClellan, the agent of the Bank, recollects nothing about it, his mind is a blank, he has no recollection of speaking to any of the defendants about signing the bond, but is confident he made no statements of the contents of the bond different from what they were. He knew the contents; he knew that it differed from the former, in being a continuing security, and thought it more advantageous for the sureties as enabling them to discharge themselves by giving notice.

"Fowke, the debtor, says, that he was applied to for a renewal of the bond by McClellan: that McClellan asked for a continuing bond, which he refused to give, and would not ask the sureties to execute. Blair had objected to signing the first bond, and he felt satisfied he would not sign a continuing security. The bond was signed by all the sureties before he signed it. He said he was present when Hudson signed it, but not the others. McClellan was present when Hudson signed; it was not read over, nor did he read it over. McClellan gave no explanation further than simply it was a renewal. Nothing was said to lead him to suppose it was for a longer period than one year. He never consented to give one for a longer time.

"Hudson, a defendant, says he never read the bond, nor heard it read, till examined. Fowke requested him to renew the bond given a year previous. If he had heard it read he would not have signed it. He would not have signed a continuing guarantee.

"Hall, another defendant, says, that McClellan asked him in October, or November, 1873, to sign the bond. He told him the former bond had expired, and he wanted it renewed for another year. He asked him if it was the same, he said it was, and for the same amount. Hall did not read the bond, nor was it read over. McClellan said it was just like the first.

"Blair, another defendant, says, McClellan told him the former bond had expired, and he wanted it renewed. Blair hesitated and postponed. Afterwards McClellan persuaded him to sign. McClellan said he wanted the bond renewed for another year. It was not read over to Blair, nor did he read it. In the fall of

1876, Blair saw Kane the Inspector of the Bank, and told him, if he considered him liable on it he wanted him to collect it at once. He told him he thought it was only for a year.

"Kane, the Inspector, was a witness to the execution of the bond by Fowke, in November, 1876. He remembers nothing having been said about its contents, nor whether Fowke read it. He speaks of the interview with Blair, but places it in February, or March, 1877, when Fowke and Blair were together. When the matter of the bond was brought up from something Fowke said, Blair said he would as soon have the amount of the bond collected, as Fowke was getting bad. He did not question his liability.

"Blair was said not to be reliable, as he had made different statements when examined upon his answer. The examination has not been left with me. But my impression of them is that in several respects his recollection of several matters is not the same now as then, but from several circumstances I shall notice I do not think his evidence unreliable.

"The evidence of all the defendants is uniform, that they thought they were executing a bond for a year only: that—some by Fowke, some by McClellan—they were only asked to sign such a bond, and that they would not have executed a continuing security. The evidence of Fowke corroborates this; he was asked for a continuing security, and refused to give it, as he was confident it would be hopeless to get his sureties to execute such a bond. McClellan has no recollection, but can only say he would not have told them a lie. That is quite possible; and I do not accuse him of wilfully doing anything to mislead. But I must take it to be established that he asked for a renewal of the bond at least, and indeed, that he said it was the same, and for the same amount as the former. The evidence of Hudson and Hall is uncontradicted. Blair's evidence is sought to be weakened by the variations in his depositions I have referred to. But whatever there may be, there is a circumstance that seems strongly to corroborate his evidence, besides what it receives from his co-defendants, and that is, that as soon as or soon after he heard from Hall of the claim of the plaintiffs in the fall of 1876, that this was a continuing security, he had an interview with the Inspector, evidently for the purpose of denying the liability now insisted on. Blair says he told the Inspector, if he considered him liable on the bond, he wanted him to collect it at once. If this is a correct account of what occurred, then Blair must have been contending against some liability; he never objected to his liability for a year, and the only other is against the liability as a continuing one. In this he is supported by Fowke, who says that at that interview Blair gave the Inspector to understand if he had any claim upon that bond he wanted him to get it, from which I think it is plain there was a dispute by Blair as to his liability. The account of the Inspector is different, but does not

seem to me inconsistent with that evidence. He represents Blair as saying he would as soon have the amount of the bond collected, as Fowke was getting bad. Kane said, Hudson was liable. Blair said he did not want Hudson to suffer. He did not question his liability, and then there was a discussion about collateral securities, in which Blair, Fowke, and Kane agree. It is true to some extent Blair did not question his liability, for he has always acknowledged he intended to be liable for the doings of a year. But Kane does not say he did not question his liability on a continuing security, and Fowke getting bad would be a reason for enforcing it speedily, even if only for a year. But this leaves untouched the main fact sworn to by Fowke and Blair, that this meeting took place soon after Blair became aware of its being a continuing security, and that he contested his liability as a continuing one.

"As corroborative of all the defendants, there is the fact of the previous bond for a year. The presumption would be, that they intended only a liability of a similar nature. And if the plaintiffs wished them to enter into a security of a different tenor, they should have informed them of it. The Bank, it seems, had determined for their own convenience, in the interval between the execution of the two bonds ; to change the natnre of the securities taken by them as guarantee, from yearly to continuing. But this change was so material to the defendants, that it should have been brought under their notice. The principle of the case of *English and Foreign Credit Company v. Arduin*, L. R. 5 H. L. 64, would seem to apply.

"When a bond had been executed under such circumstances, the defendants supposing they were signing one thing, and in reality signing another, there was no intention to become bound to these terms, and there was that want of assent which vitiates any contract. It is invalid on the ground that the mind of the signers did not accompany the signature ; they never intended to sign, and therefore, in contemplation of law, never did sign the contract to which their names are appended. The following cases all enunciate and enforce that principle, and that the evidence applies to the plea of *non est factum*." *Vorley v. Cooke*, 1 Giff. 230 ; *Ogilvie v. Jeaffreson*, 2 Giff. 353 ; *Foster v. Mackinnon*, L. R. 4 C. P. 704 ; *Hirschfeld v. London &c. R. W. Co.*, L. R. 2 Q. B. D. 1 ; *Rawlins v. Wickham*, 3 De. G. & J. 304.

"And I cannot accept the statement, that the bond is really now more favourable to the sureties, as enabling them to withdraw on giving notice. It might suffice to say, that was not the contract, but the power to be relieved is so qualified as not to be so readily available as suggested. No one can withdraw at his own pleasure, but all the sureties must sign a writing, countermanaging the guarantee, and to be delivered to the Cashier at Toronto :—it was to continue, notwithstanding the death of sureties, till written notice signed by the survivors or the legal representatives of the deceased was given to such Cashier.

"Nor does it seem to me to be of importance, whether the defendants obtained the idea of the temporary nature of the security they were giving either from the representations of the plaintiffs' agent or otherwise, some time prior to the signing of the bond, and that nothing was said by McClellan *at that time* tending to mislead. The effect upon the mind was the same; it created an impression upon their minds that remained until, and long after, the bond had been executed. And as a matter of fact the argument is hardly borne out by the evidence, for Hall swears that when he signed he was assured by McClellan of the nature of the bond.

"I conclude that this bond was not such as to bind the defendants."

The learned Vice-Chancellor found a verdict for the defendants generally.

In Easter term, May 3, 1879, *Robinson*, Q. C., obtained a rule calling on the defendants to shew cause why the verdict for the defendants should not be set aside, and a verdict entered for the plaintiffs.

In this term, February 9, 1880, *Hector Cameron*, Q. C., and *Farewell*, shewed cause. It is agreed that the question of the validity of the bond, that is, of the liability of the defendants, should alone be argued at the present time, because should the Court sustain the finding of the learned Vice-Chancellor there would be no use in discussing the other questions which arose and were disposed of at the trial. The result of the evidence is, that the defendants were induced to execute the bond by the fraud and misrepresentation of the plaintiffs. The evidence shewed that McClellan represented that the bond was merely a renewal for a year of the previous bond, which was for a like period; that it was in fact just the same as the old one. The defendants state that had they known that it was a continuing security they never would have executed it; It is clear that misrepresentation as to the contents of a deed invalidates the deed, and may be relied upon as a defence to an action on the deed. A man cannot be said to contract when he executes a document upon a representation and under a belief that he is executing something

different from that which it turns out to be. The misrepresentation here vitiated the deed. The plaintiff's urge that there was negligence in the defendants in not having read over the bond and acquainted themselves with its contents; but they can be fairly relieved from doing so when they were told that it was exactly similar to one which they had read over and were fully conversant with. The cases shew that there is no liability: *Proprietors, &c., of English and Foreign Credit Co. v. Arduin*, L. R. 5 H. L. 64; *Foster v. Mackinnon*, L. R. 4 C. P. 704; *Hirschfeld v. London, &c. R. W. Co.*, L. R. 2 Q. B. D. 1; *Rawlins v. Wickham*, 3 DeG. & J. 304; *Brandt* on Suretyship, p. 468, sec. 348; *Municipal Council of Middlesex v. Peters*, 9 C. P. 204; *Reynell v. Sprye*, 1 DeG. McN. & G. 660; *Kerr*, on Fraud, p. 48-9; *Clough v. London and North Western R. W. Co.*, 20 W. R. 189. The defendants, being sureties, never incurred any liability on the bond, as it was not signed by the principal, it not having been signed by the principal until some two years afterwards: *Brandt* on Suretyship, p. 178, sec. 127; *Bean v. Parker*, 17 Mass. 591; *Corporation of Huron v. Armstrong*, 27 U. C. R. 533; *Evans v. Brembridge*, 8 DeG. McN. & G. 100, 109.

Robinson, Q. C., and *McMichael*, Q. C., contra. The finding of the learned Vice-Chancellor is not borne out by the evidence, which fails to shew that there was any misrepresentation by McClellan to induce the defendants to enter into the bond. His evidence is as strong as it could be in denial of any such misrepresentation. He could not recollect a conversation alleged to have taken place six years before, but he said he knew of the change in the bond, and that had he told defendants that it was the same he would have been telling a deliberate falsehood. He could have had no possible object in making any such representation. The bank had already the security of the same defendants on the former bond, and had the defendants refused to give the bond in question the bank could have immediately enforced the existing security. The defendants should have read over the bond

before executing it, and by omitting to do so are guilty of such negligence as to estop them from setting up they were misled. The cases shew that to constitute a good defence, not only must the defendants shew that they were deceived into executing the instrument, but also that there was an absence of any negligence on their part. Moreover, what is alleged here, if true, namely, saying that the second bond was a renewal, did not constitute a misrepresentation, for in one sense it was a renewal; and the second bond was certainly more favourable than the first, for it could be terminated at any time, by notice in writing to the bank. A corporation like the plaintiffs might be held bound on a clear proof of fraud by their agents, but not as here by loose conversations, and particularly when the defendants do not take the trouble to read over the document, and satisfy themselves as to its contents, and the corporation has accepted it as *bona fide* executed. There was every opportunity for the defendants to read the bond—no one attempted to prevent their doing so—and they one and all neglected to do so, for no reason but their own carelessness and indifference. There was no motive on the plaintiffs' part for the alleged misrepresentation, which is distinctly denied, and which consisted in loose conversations not even made when the bond was being signed. The bond has been acted upon for many years, another security given up, and large sums advanced on the faith of it; and, lastly, when the defendants were made acquainted with the alleged fraud which they say had been practised upon them, they did not repudiate their liability, as they were bound to do promptly and distinctly, but rather admitted it. No one in business would be safe if, after the lapse of so many years, such a security could be set aside on such evidence, and no case can be found in which it has been done: *Foster v. Mackinnon* L. R. 4 C. P. 704; *Duke of Beaufort v. Neeld*, 12 Cl. & F. 248; *Wade*, on Notice, p. 239, sec. 537; *Smith v. Capron*, 7 Hare 189; *Harris v. Great Western R. W. Co.*, L. R. 1 Q. B. D. 515, 530; *Hodges on Railways*, 6th ed., 616-7; *Simons v. Great Western R. W. Co.*, 2

C. B. N. S. 620; *Coates v. Bacon*, 21 Grant 21, 29; *Henry v. Pindar*, 22 Grant 257; *Campbell v. Edwards*, 24 Grant 152, 175; *Superior Savings and Loan Society v. Lucas*, 44 U. C. R. 106, 126; *Daniel* on Negotiable Instruments, 2nd ed., vol. i., p. 699, sec. 850; *Kerr* on Fraud, 240-1, 247; *Morrison v. Universal Marine Ins. Co.*, L. R. 8 Ex. 40; *Sheffield Nickel Co. v. Unwin*, L. R. 2 Q. B. D. 214; *Pollock* on Contracts, 2nd ed., 515-8; *Brandt* on Suretyship, p. 151, sec. 107, p. 158, sec. 113-4; *Hunter v. Walters*, L. R. 7 Ch. 75, 87; *Bliss v. Thompson*, 4 Mass. 488.

March 5, 1880. GALT, J.—The only question which on the present occasion we are called upon to decide is, whether the bond was void in its inception, for if it was a valid obligation when it was executed nothing has since been done which according to its terms would have put an end to it, no notice in writing having been given by the defendants, or any of them, to the cashier of the bank of their desire to be relieved.

The charge against the officer of the bank, Mr. McClellan, is a serious one: namely, that he by fraud induced these defendants to execute the bond, the fraud being that he falsely represented to them that the bond now in question was a renewal only of a similar obligation to which they were parties. There had been a bond the same as the present, except that the period for which it was to continue was limited to a year without any power on the part of the obligors to terminate it within that period. The present one is a continuing obligation, but with power reserved to them to relieve themselves at any time by giving notice in writing to the cashier of the plaintiffs.

In considering this question we must bear in mind that the agent of the plaintiffs could have had no present object in inducing the defendants to execute the bond beyond carrying on the account, for at the time they executed it they were liable for the then existing account under the terms of the first bond, which covered the then existing liabilities of Fowke.

It is not pretended that any obstruction was placed in the way of the defendants, or any one of them, in reading the bond; all that is alleged is they were told it was the same as the first.

It is plain from the evidence of the parties to the bond that nothing was said to them to induce them not to read the bond, except that it was represented that it was a renewal of the former obligation, and they do not say positively that if they had known it was a continuing security they would not have signed it: they only say they do not think they would have done so.

It is clear that the statement made by Fowke, that he did not know of the contents of the bond until the suit was commenced, is not correct. Immediately afterwards he admits that the inspector of the bank, two and a half years after the bond purported to be signed, which was at least two and a half years before this suit was brought, told him that it was a continuous bond.

The case of *Foster v. McKinnon*, L. R. 4 C. P. 704, was very much relied upon by the learned counsel on both sides, as containing a true exposition of the law on the subject of Fraudulent Representations. We need not consider the facts of that case because the Court were of opinion that there should be a new trial, and expressed no opinion on the facts. They however stated they thought the direction of the learned Chief Justice was correct.

That charge was as follows: "The Lord Chief Justice told the jury that, if the indorsement was not the signature of the defendant, or if, being his signature, it was obtained upon a fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and if the defendant was not guilty of any negligence in so signing the paper, he was entitled to the verdict."

I have carefully considered the judgment of the learned Vice-Chancellor, before whom this case was tried. He has arrived at the conclusion that the bond was void on the

ground that when the defendants executed it they thought, and were induced by the representations of Mr. McClellan to believe, it was similar to the previous one, and was to be in force for only a year; but he has not referred to the question as to whether the defendants themselves "were not guilty of any negligence" by not taking the trouble to read the instrument.

I confess I see great difficulty in carrying on the affairs of life if a person can be heard to say, "It is true I signed the deed, but I thought it was different from what it turns out to be; but I never took the trouble to read it."

I confess, however, that the evidence impresses me very differently from what it did the Vice-Chancellor. I consider that so far as Mr. McClellan's evidence being a blank it is as strong a contradiction as it is possible to the allegations made by Blair and Hall against him. He is asked whether he made any efforts to get the security, or asked them to sign the bond. His answer is "No," and he emphatically denies having held out any inducements for them to sign the bond. And in answer to the question, "Is it possible that you told him (Blair) this second bond was the same as the last, only for a year and a day?" his reply: "I could not, unless I told him a deliberate lie," (and of this the Vice-Chancellor expressly acquits him) conveys to my mind a denial as emphatic as it was possible for him to give.

I place no reliance whatever on the evidence of Fowke, as I cannot reconcile the contradictory statements made by him.

The question, then, is reduced to this: there is a bond purporting to be a continuing security, but containing a clause empowering the sureties to discharge themselves at any time by giving notice to the bank of their wish to be relieved; and the same persons were already liable to the bank, to the same extent, by a bond which had ceased to be binding for any new obligations, but which left them responsible for all the dealings of their principals up to the time when they executed the present bond. It was, there-

fore, their interest that time should be extended to him, unless they desired to close the transaction, which it is not pretended they wished to do. They do not assert positively that they would have refused to execute it if they had known it was continuous, but they say they think they would. No attempt was made to prevent their reading the instrument, and from the evidence it appears to me that no fraud or misrepresentation was made to induce them to refrain from reading it.

When we are considering the value of testimony, we must take into account the position of parties, and the interest they have in giving that testimony.

In the present case it is of great moment to the defendants to relieve themselves from responsibility, whereas I can see no motive to induce Mr. McClellan to make a false statement. He is not now, nor has been for some time past, in the service of the plaintiffs.

In the case of *Foster v. McKinnon*, L. R. 4 C. P. 704, already referred to, one of the conditions which the Chief Justice held to be necessary, in order to relieve the defendant from liability, was, "that he was not guilty of any negligence in signing the instrument," and this view was adopted by the Court.

It appears to me, that before a man can claim relief from the effects of any instrument signed and sealed by him, he must shew that his signature was obtained by fraud and misrepresentation, and as I think there is no sufficient evidence of either fraud or misrepresentation in the present case, that this rule should be made absolute to enter a verdict for the plaintiffs. But as the other questions remained to be discussed, the final disposition of this rule will be suspended until next term.

WILSON, C. J., and OSLER, J., concurred.

COLEMAN V. ROBERTSON ET AL.

Deed—*Water's edge at low water mark—Ad medium filum aquæ—Proviso restricting to water's edge—Possession.*

In ejectment the defendant claimed under two deeds to P. and N. respectively. In the deed to P. the land was described as “commencing on the verge of the river Moira at low water mark;” and then, after describing the first two courses, the third course was stated to be “to the water's edge of the said river at low water mark,” and it concluded, “and thence down with the winding of the said river to the place of beginning.”

Held, that the particular limitation must be construed specifically as stated, so that the land must be deemed to extend merely to the low water mark, and not *ad medium filum aquæ*.

In the deed to N., which was of the land adjoining, the description was: “Commencing at the north-west corner of P.'s lot, *i.e.*, the point at which the third course of P.'s grant terminated, namely, the water's edge of the river Moira at low water mark,” and from that starting point, after describing the first two courses, the third course was, “to the water's edge of a small inlet or bay; and, after describing the fourth course, namely, “and thence along the water's edge to the place of beginning,” there was added the following proviso: “With the privilege of extending any building or buildings fifteen feet from the water's edge, providing the same does not obstruct or diminish the width of a small inlet or bay in the rear of said lot intended for bringing saw logs therein.”

Held, that the effect of the proviso was to limit the boundary of the lot strictly to the water's edge of the small inlet or bay.

A claim of possession set up by the defendant to the land in question, except as to fifteen feet thereof, which on the evidence the defendant was held entitled to, was decided against him.

EJECTMENT for land in the city of Belleville.

The plaintiff, Charles Coleman, claimed by deeds dated 26th March, 1846, and 3rd January, 1857, from Thomas Coleman to him, and as one of the heirs of Thomas Coleman, father of the plaintiff, deceased, who died intestate; and by possession of the said Thomas Coleman, and the plaintiff, for the different periods of ten years, twenty years, and sixty years, the whole of the land in question, and much more than it. The plaintiff's description extends to the centre of the river.

The defendant Alexander Robertson, on behalf of himself, and, by leave of the Court, as landlord for the other-

defendant, Henry McInich, appeared to the said writ herein and denied the plaintiff's title, and limited his defence to the low water mark of the river as existing at the present time; and the question was, whether he could so claim, or was not limited by the former or old water line, as appearing in the course of the case.

Robertson asserted title in himself to the land to which he limited his defence:

1. By deeds from Thomas Coleman to Micajah Purdy and Theophilus Nelson, through whom he, the said defendant, claimed.

2. By the Statute of Limitations, that is, by length of possession of the defendant Alexander Robertson, and those through whom he claimed, for the several periods of time allowed by law for the acquisition of title to land by possession.

3. By deed from the plaintiff to the said defendant.

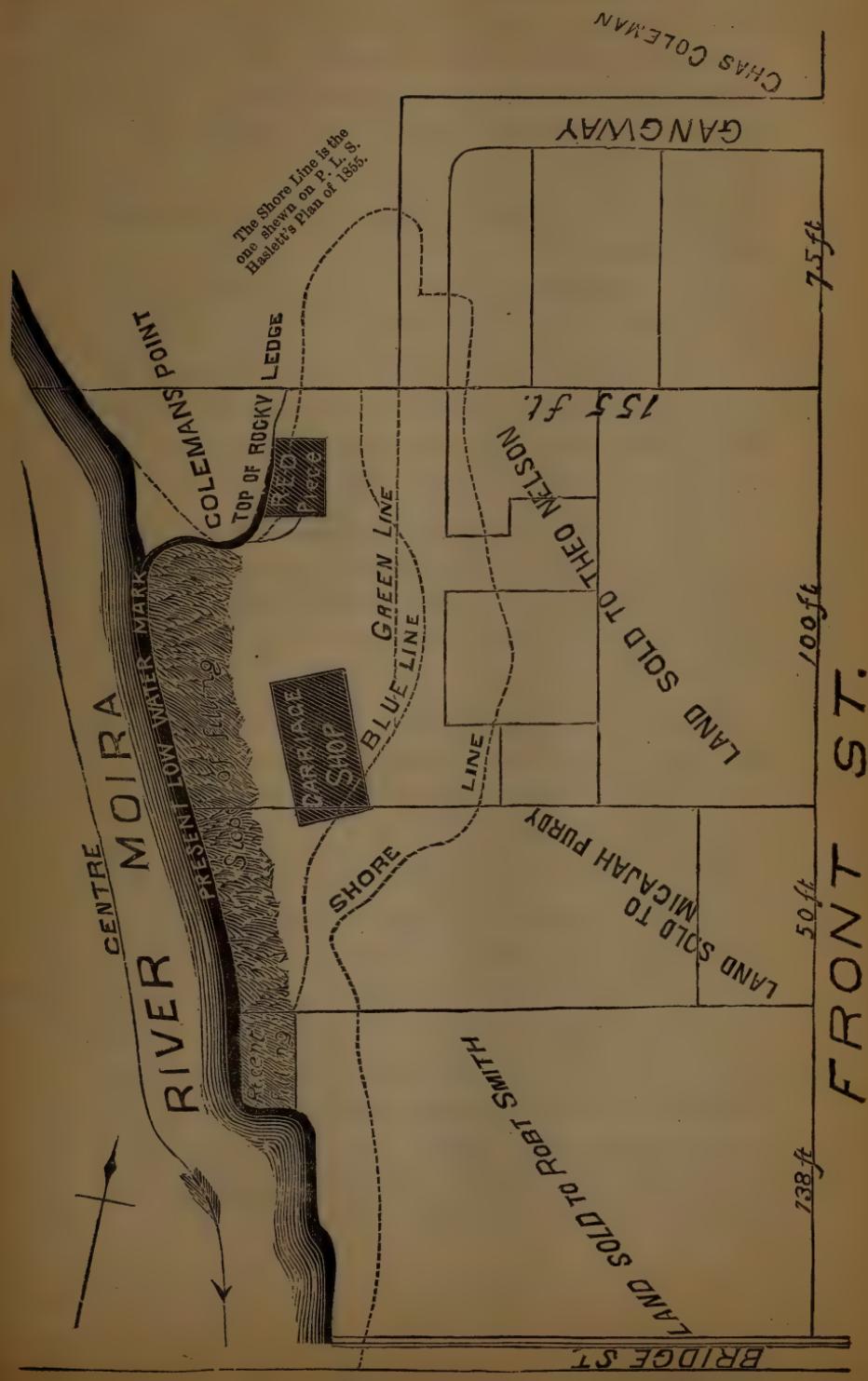
The cause was tried before Patterson, J. A., without a jury, at Belleville, at the Fall Assizes of 1879, when he found a verdict for the defendant.

The plan on the next page is the one referred to herein.

The learned Judge stated the facts fully in the written note made by him, upon which he founded his verdict, and from which the following statement is chiefly made.

Thomas Coleman owned the whole township lot, and comprising the land on both sides of the river.

On the 1st of May, 1818, he conveyed in fee to Micajah Purdy the following parcel of land: "Commencing on the verge of the river Moira at low water mark, and at the north-west corner of the division line of a plot or piece of land sold by Thomas Coleman to Robert Smith; thence along the said division line to Front street, or the line between lots numbers three and four in the first concession; thence extending northerly on the division of lots three and four, and on the west side of Front street, fifty feet, to Theophilus Nelson's lot adjoining; thence parallel with Nelson's line to the water's edge of the said river



Moira at low water mark ; thence down with the winding of the said river to the place of beginning."

The learned Judge said : " I think the effect of the deed was to convey the land to Purdy *ad medium filum aquæ*, but the point was not raised by counsel. * * And as to this lot, I hold that Thomas Coleman had divested himself of [so much of] what he professed to convey in 1857 to the plaintiff."

Thomas Coleman, on the 20th of March, 1819, conveyed to Theophilus Nelson in fee the land described as follows : " Commencing at the north-west corner of Micajah Purdy's lot ; thence alongside of said lot to the division line between lots three and four ; thence along the division line one hundred feet ; thence parallel with the side line to the water's edge of a small inlet or bay ; thence along the water's edge to the place of beginning. With the privilege of extending any building or buildings fifteen feet from the water's edge, providing the same does not obstruct or diminish the width of the mouth of a small inlet or bay, in the rear of said lot, intended for bringing sawlogs therein."

The learned Judge observed that the line between Purdy and Nelson is described [it is presumed he means in Purdy's deed] as running " to the water's edge of the river at low water mark," whereas the line touches the waters of the bay or inlet.

He then says : " I think the Nelson land must be held, as well as the Purdy land, to extend *ad medium filum* until that extension is interrupted by the point." [Coleman's Point.] " In other words, the south half (or thereabouts) of the lot extends *ad medium filum*. The other half is bounded on the bay, and not on the river proper, and as to it other considerations arise. There is, perhaps, authority for contending that even this extends to the centre of the river, including point and all ; but it is not necessary to consider closely how that may be, as the defendant does not, and for good reasons cannot, assert any right to the point. The land conveyed was undoubtedly

to the water's edge ; and this, read with the other parts of the description, made the water, at what is called rather indefinitely low water mark, the boundary. It is shewn that at the date of the deed the bay contained water. I should judge from the whole account given of it that the water in it was not very different in its ordinary depth from that in the river. That water, in my opinion, formed the shifting boundary of the northern half of Nelson's lot. The bay gradually filled with sawdust and rubbish, carried into it by the action of the river, or thrown in as a convenient place for depositing it.

"Thomas Coleman intended to cut a canal through a natural depression, which terminated on the bay, and reserved fifteen feet of land for the purpose in deeds given of lands above the bay. That purpose was abandoned. The bay became gradually shallower, and it is now impossible to say with accuracy what particular spot should be taken to represent what was low water mark. Wherever it was, was the boundary of the lot. If necessary to find as a fact where it was, I should find it to have been in the centre of the bay, though there is evidence which would place it nearer the point.

"It is contended that the proviso at the end of the description indicates that the lot extended only to the bank, and that the idea conveyed is that buildings may be projected *fifteen feet* beyond the bank, supported on piles, or in some similar way. I do not think this can qualify the express extension of the line to the water's edge, or do away with the direction to follow the water's edge to the place of beginning, which was expressly fixed at low water mark. Besides, the privilege is to extend the buildings fifteen feet from the water's edge, not from the bank.

"The result of the view I have taken of the conveyance is, that if my view is correct the only portion of the land for which the defendant Robertson defends to which the plaintiff shews title, is the small piece indicated in red upon my sketch, and that is a piece which, although it has

been filled in and reclaimed by the defendant, and now forms part of the solid land where the bay used to be, is not actually occupied or used by the defendant.

" If low water mark has to be fixed at some definite line, as I suppose must be done in case my construction of the deeds is not adopted, I shall have to come to such a decision as, under the evidence, and after seeing the premises in their present condition, I can arrive at.

" I take the object of a conveyance to low water mark to be to enable the grantee to reach the water when it is low as well as when it is high.

" From the description in the plaintiff's deed of 1857, as well as from what transpired during the early part of the trial, I gathered that the plaintiff had brought the action with the idea that his paper title reached to the bank, which is shewn on the large plan by a dotted line, and which is indicated upon my sketch. In that he was clearly mistaken. The bank has been obliterated by filling in, but there was distinct evidence of where it had been. The uncertainty was not as to the position of the bank, but as to that of the low water.

" I think a reasonable consideration of the evidence, assisted by a view of the shores as they are now, will place the line about where I have indicated by a blue line on the large plan, or at the distance of thirty feet from the bank.

" The question of the Statute of Limitations does not become material, if the Purdy and Nelson titles are held to extend to the blue line, as I do not think it can be found that the defendant has had ten years' possession of any land beyond that line. It is only material to a contest respecting the land between the bank and the blue line.

" The facts on which the question of possession depends are not numerous. In 1863 the defendant was building some houses, and he disposed of the earth and stones from the excavation, partly by spreading the material upon the Purdy lot, so as to raise it in places, and partly by filling in

in front of that lot and the Nelson lot. It seems to have been in view of this work that the plaintiff, upon the 8th of April, 1863, gave the defendant notice not to enter upon any of his, the plaintiff's, lands, and place dirt or rubbish thereon. The plaintiff had himself begun to fill in the small bay at its northern extremity, and the defendant, on receiving the plaintiff's notice, retorted by a counter notice, forbidding him to fill in the bay in rear of the defendant's lots. The plaintiff continued filling; but only up to the line of the defendant's land. It does not appear that he stopped at that line because of the defendant's notice.

"Another reason is suggested, having reference to the necessity of avoiding the stoppage of some pump logs which conducted water to a brewery on the lot north of defendant's land. But whatever the reason is, he did stop.

"It is not clearly shewn to what point the defendant filled in at that time, but it evidently was to some substantial extent. On the one hand, it is argued that this filling in was not possession, being only making use of the river as a place for throwing stuff that had to be got rid of. On the other hand, it is urged that the filling was so much additional land added to the defendant's lots, and that it was as much in his possession and occupation as the original lots themselves.

"I am inclined to that opinion. But the defendant further appeals to an incident which occurred as lately as April, 1879, as evidence that the plaintiff had himself regarded this made land as the land of the defendant. The defendant was about to erect buildings on Front street upon his lot. In order to have access to the rear of his lots, he required either to have a lane from the street upon his own land or to procure access over some other land. James Gordon, who occupied a lot north of the defendant's lot, had upon his north side a lane leading only to his own premises. The plaintiff owned the lot next north of Gordon. It was arranged that the lane should be extended farther back, between Gordon and the plaintiff, upon Gordon's land, and that the plaintiff should have a right

of way over it. Gordon's lot did not run back to the bay, and the plaintiff owned the land in rear of it. The plaintiff was to give, as an equivalent for the use of Gordon's lane, a right of way to Gordon and the defendant over a lane fifteen feet wide, which he was to lay out across the rear of Gordon's lot, and reaching to the line of the defendant's lot; and the defendant, for the use of this new lane and of Gordon's lane to Front street, paid Gordon \$700. The dedication of these lanes was effected by a deed of the 23rd of April, 1879, between the plaintiff and Gordon and the defendant. In this deed it was recited that the plaintiff owned the lands lying west of Gordon's, Haines's, and Lockett's lands, [Haines and Lockett owning lands between Gordon and the defendant,] and north of the westerly part of the defendant's lands—the description fitting no lands of the defendant except those claimed in this action by the plaintiff. The deed described the fifteen feet way by a line running along the rear of Gordon's land 'to the northerly limit of the property of Alexander Robertson, thence westerly along the northerly limit of Alexander Robertson's property fifteen feet,' while on the plaintiff's present contention the lane would not touch the defendant's land.

"In addition to this, there was evidence that the plaintiff was desirous of having the lane extended through to Bridge street," [that is quite across the lot, as the defendant claims it, to the south,] "if the defendant would agree to its being opened through his property.

"Upon the whole of the evidence, I find that the defendant had possession, for over ten years before suit, of all that part of the land now claimed by the plaintiff which lies east of the westerly line of the fifteen feet lane produced across the defendant's lots.

"For another reason, the plaintiff ought not to be allowed to disturb the defendant in the occupation of the land I have just described, and that is that in reliance on the recognition of his title to this land, and the grant of the way to it by the lane, the defendant has erected expensive buildings upon the whole front upon Front street, and has

no other access to the rear of them. The small piece of land which I have indicated in red on my sketch, and which I find to belong to the plaintiff, extends from the rock called Coleman's Point easterly to a line thirty feet from the bank shewn on Haslett's plan of 1855, being, I think, an average distance of thirty feet about, and from the north line of the defendant's land produced to a line parallel with that line, and which will strike the point at its southern extremity, being, I think, a distance north and south of about thirty-five feet. This is an insignificant part of the land in dispute, and cannot be properly regarded as the subject of the action. If the plaintiff succeeds only for this he will have substantially failed, and ought not to have the costs of the suit. I give effect for the present to my construction of the deeds, as having divested the plaintiff's grantor of the land really in dispute. Disposing of the case in this way, I think justice will be done by allowing the defendant further to limit his defence, by excluding the small bit of land, on terms of allowing the plaintiff on taxation, as costs of the amendment, the sum of \$20, to be deducted from the costs to the defendant; and I shall enter a verdict for the defendant.

"This amendment, and the terms on which it is granted, as well as all other questions, are open for the Court."

A very great deal of evidence was given. It is not necessary to set it out. The material part of it is contained in the judgment of the learned Judge.

In Michaelmas term, November 29, 1879, *Wallbridge*, Q.C., obtained a rule calling upon the defendant to shew cause why the verdict should not be set aside, and a verdict entered for the plaintiff.

In Hilary term, February 10, 1880, *Bethune*, Q.C., and *Dickson* (Belleville), shewed cause. The description of the two deeds of 1818 and 1819 covers the whole of the land in question, because the westerly limit being to and along the water's edge, the grant extended to the middle of the stream: *Kains v. Turville*, 32 U. C. R. 17; *Wishart v.*

Wyllie, 1 Macq. H. L. 389; *Harrison v. Frost*, 34 U. C. R. 110; *Dixson v. Snetsinger*, 23 C. P. 235. The special mention in the deed, under which the defendant claims, of the right of the grantee to extend his buildings fifteen feet from the water's edge, so that the mouth of the bay was not obstructed, did not operate against the grantee as to the limit of his grant: *Bickett v. Morris*, L. R. 1 H. L. Sc. 47. The deed of the 23rd of April, 1879, to which the plaintiff and defendant are parties, granting the lane up to the defendant's land, and thence extending along his northerly limit fifteen feet, is an estoppel against the plaintiff setting up any title adversely to that grant. The lane would be of no use to the defendant, for which he paid Gordon \$700, unless the defendant had land in rear of his buildings to and upon which he could enter from the lane. The defendant has also a claim to the land in dispute by an equitable estoppel, because the plaintiff saw the defendant filling up the place and did not obstruct or object to it: *Ramsden v. Dyson*, L. R. 1 H. L. 129; *Unity Joint Stock Mutual Banking Association v. King*, 25 Beav. 72; *Smith v. Gibson*, 25 C. P. 248; *Carrick v. Smith*, 34 U. C. R. 389; *Acheson v. McMurray*, 41 U. C. R. 484. It was expressly found that the defendant had the actual possession of the fifteen feet in the rear of his lot. The same evidence would warrant a finding of title by possession to all the defendant claims in the action. The defendant and his tenants have used the premises all the way from the rear of the buildings to the river for more than twenty years. In 1863 the plaintiff was filling up some of this land, and the defendant gave him notice to desist, and he did so. The defendant did in that year a good deal of filling in. In 1876, the defendant did again a good deal of filling in, and in 1878 and 1879 he filled in the remainder of all that has been done, and all that was done without objection by the plaintiff, who knew of it. The plaintiff objected to some stone which was piled upon a particular part of Coleman's Point, and the defendant removed it; but he never objected to the filling up of the

land in question. That question of possession should have gone to the jury, but the learned Judge, after the plaintiff was examined, discharged the jury that had been sworn, the defendant's counsel protesting, and he proceeded under protest. As the deed to Purdy extended the grant to the water's edge, and Nelson's deed starts from the same point and extends to it, his front was also to the water's edge, and the construction of such a grant is that it extends to the middle of the stream, which will give to the defendant all he has defended for. The defendant claimed at the trial compensation for his improvements, in case the finding was against him, under the R. S. O. ch. 95, sec. 4: *Aston v. Innis*, 26 Grant 42; *McCarthy v. Arbuckle*, 29 C. P. 529.

Wallbridge, Q. C., contra. The defendant's grant under which he claims, which was made to Nelson in 1819, giving it the widest construction in his favour, extends only to low water mark. The defendant at the trial did not claim to the middle of the stream. In any case the defendant must go beyond the middle waters of the bay as distinct from the river, which is some distance beyond the bay. The mention of the fifteen feet to the south of the lot shews the grantee was restricted to that fifteen feet as his furthest westerly limit and the proviso attached to it, "so long as it does not obstruct the bay," &c., proves it conclusively, and that the rule "*Ad medium flum*," does not apply: *Elliott v. Baird*, 26 Grant 549; *Robertson v. Watson*, 27 C. P. 579, in appeal, 591; *Phear on Rights of Water*, 71 and note; *Wickham v. Hawker*, 7 M. & W. 63; *Graham v. Ewart*, 11 Ex. 326; *Kains v. Turville*, 32 U. C. R. 17. When the plaintiff got the defendant's notice in 1863 to stay the filling up at the north part of the bay, he did so because he had no right properly to obstruct the defendant from the waters of the bay. The plaintiff had before that in the same year given the defendant notice to stay the filling up, which he was then doing, and upon that the defendant served the notice. The defendant's notice is a limit of his own rights. If the defendant argue that the

plaintiff has admitted any right in the defendant to the land in rear of his lot, the defendant is equally bound by that deed in admitting that the plaintiff had that portion of the bay to grant. The filling in of the land was for the purpose of the defendant getting rid conveniently of his waste material when he was building, and is not necessarily an act indicating title or a taking possession. The filling in done by the defendant has destroyed the bay for the purpose for which it was intended, and it is a forfeiture of his right even to the fifteen feet immediately south of his lot. It is not necessary the plaintiff should prove damage : *Earl of Norbury v. Kitchin*, 15 L. T. N. S. 501 ; *Higgins* on Water Courses, p. 159 ; *Bickett v. Morris*, L. R. 1 H. L. Sc. 47.

March 5, 1880. WILSON, C. J.—The learned Judge was of opinion that the conveyance from Coleman to Purdy of 1818, "commencing on the verge of the river Moira at low water mark," and then, after describing the first two courses, stating the third course to be, "to the water's edge of the said river at low water mark," and concluding, "and thence down with the winding of the said river to the place of beginning," carried Purdy's river or west side of the land to the middle of the stream.

I think that is not the effect of it. A grant of land to the river, or margin or edge of it, or to the bank, or along the river, will *prima facie* carry the grant to the *medium filum aquæ*; but this description is from a particular point, "the verge of the river at low water mark," and the returning line to the water is expressed in like way, "to the water's edge of the river at low water mark," and thence with the winding of the stream *to the place of beginning*, that is, *to the verge of the stream at low water mark*.

I do not see then why this particular limitation should not be binding just as it is specifically stated. If the grant had been *to high water mark* there could be nothing whatever from which an intention could be inferred to extend it *to low water mark*, and still less to carry it further, to

the middle of the stream; and the rule of *ad medium filum* is one of presumption only.

A river or stream is composed of three parts, the bed, the banks, and the water; and the bed consists of all that part up to high water mark, and the banks of that part of the land which is above high water mark. A grant to high water mark would, in my opinion, exclude the *alveus*, or bed of the stream, altogether; to low water mark it would exclude the grant from extending to the centre thread of the stream, because the grant of a part of the bed will exclude a grant by presumption of more than that part which was expressly given.

The grant to Nelson, in the year after the conveyance to Purdy was made, describes the land as "commencing at the north-west corner of Micajah Purdy's lot." That is, by reference to Purdy's deed, the point at which the third course of his grant terminates, namely, "the water's edge of the river at low water mark." From that starting point, after describing the first two courses, the third course is represented to extend "to the water's edge of a small inlet or bay; thence along the water's edge to the place of beginning."

As the bay is a small inlet from the river, the waters of the bay always corresponded with the level of the waters of the river, and, as the starting point of Nelson's grant was the low water mark, the returning line of Nelson's grant to the water's edge of a small inlet or bay, would, in the absence of anything else to the contrary, have meant to the water's edge at low water mark: but, as Nelson was expressly given the privilege of extending buildings fifteen feet from the water's edge by the following clause, the limit of the third course, to the water's edge, must end there, and cannot be extended to low water mark. That clause reads as follows: "With the privilege of extending any building or buildings fifteen feet from the water's edge, providing the same does not obstruct or diminish the width of the mouth of a small inlet or bay in the rear of said lot, intended for bringing saw logs therein;" which language, in my opinion, plainly excludes the bay, or any part of it,

from the grant of land to Nelson, and limits his lot strictly to the water's edge of the small inlet or bay : *Robertson v. Watson*, 27 C. P. 591, 597, That line will extend southerly all along the rear of his lot, which is 100 feet, and from the termination of that line it will keep along the low water mark, that is, across the Purdy lot, to the place of beginning of the Purdy lot at low water mark.

In *Marquis of Salisbury v. Great Northern R. W. Co.*, 5 C. B. N. S. 174, the presumption of a highway to the centre adjoining land granted by the plaintiff, was held to be rebutted by the fact, that the grant was of copyhold land which the grantor was to hold, *as part of the copyhold of the manor*. I refer also to *Robertson v. Watson*, in appeal, 27 C. P. 591, and to *Beckett v. Corporation of Leeds*, L. R. 7 Ch. 421, and *Child v. Starr*, 4 Hill N. Y. 369, as bearing on the general question.

It would seem there is no difference between alluvium arising from artificial causes and that arising from natural causes ; the owner of the adjoining land is entitled to his increase in each case alike : *Attorney General v. Chambers* 4 DeG. & J. 55 ; *Standly v. Perry*, 2 App. 195.

This question of the grant extending to the middle of the stream was, as the learned Judge has stated, not raised at the trial by the parties, but it presented itself to his mind when he was disposing of the case, after reserving it. The defendant said expressly, " We claim to the water's edge. * * I regarded the waters of the bay as my western boundary. * * I claim the bay or inlet by possession. I don't contend that it was covered by the deed ; the greater portion was covered by the deed. * * I had the right to all the property in the rear of these premises, and the right to the edge of the bay or inlet, that is to low water mark." In the defendant's notice of 1863, he forbade the plaintiff from filling up " a small inlet or bay intended for bringing saw-logs therein, lying and being immediately in the rear or west of the following premises"—then he set out the abutments of his own land—and added, " which lies directly south of the premises lately sold by the Honorable

Alexander Campbell to George Nelson, Esquire, on the west side of Front street," where that land of Nelson is was not pointed out, and is not shewn on the plan. The notice then continues, that if the plaintiff placed any dirt or rubbish in the " small inlet or bay intended for bringing saw-logs therein, I will not only prosecute you for trespass and for obstructing the original boundary line on the river of the premises sold by Thomas Coleman to Theophilus Nelson, * * but I will regard the inlet or bay so filled up as a parcel of the last mentioned lot, and proceed to use the same as I may deem fit ; and further, that I will extend my building or buildings fifteen feet from the water's edge in the then extreme rear of said lot, should the said inlet or bay be obstructed or filled up."

It is important then to determine what would have been "the water's edge of the small inlet or bay," at the time of the action brought by the formation of the ordinary alluvium, whether from natural or from artificial causes, computing that alluvium to have arisen only from the ordinary and fair use of the land, and not from acts done with a view to the acquisition of the additions made: *Attorney General v. Chambers*, 4 DeG. & J. 55.

The learned Judge has, after a great deal of pains, fixed the low water mark to be along the blue line he has marked on the large plan produced, or at the distance of thirty feet from the line of the former bank of the stream as it is laid down on that plan, and which line of the bank was proved, as he thought, by very clear evidence. If Nelson had been entitled by the deed to go to low water mark, that would be as correct an approximation to what would, but for the late very extensive filling up done by the defendant, have been about the present low water mark. But as he is, in my opinion, entitled by the deed to take only to the water's edge, that blue line will not answer. What will be done, whether by Judge or jury, in such a case must be to some degree speculative. But we may proceed nevertheless with full justice to the defendant and probably with reasonable accuracy, if the defendant

receive the fifteen feet, to which extent he was allowed to extend his buildings into the bay, and if the westerly limit of the fifteen feet be treated as what would have been the water's edge of the bay but for the filling up. That fifteen feet will give to the defendant the full use of the fifteen feet lane which he bought for an entrance into his lot at the rear, and it is the only part of all the land in dispute which the learned Judge has found the defendant to have held by length of possession, to give him a legal title. It does not appear, however, that a title by possession can arise where the right has been expressly conferred by the deed to Nelson. Taking the west line of the lane of fifteen feet, and continuing it southerly along the rear of the defendant's lot as the defendant's westerly limit, will do away with any question of estoppel arising by the deed of the 23rd of April, 1879. But I do not think the estoppel, if it could have been maintained, could have been used to a greater extent than the fifteen feet corresponding with the width of the lane. Then from the intersection of that westerly line with the southerly limit of the Nelson line produced, the rest of the course may proceed on the blue line of the learned Judge to the place of beginning, of Micajah Purdy's grant. The line I have indicated west of the Nelson lot is very nearly the same as the blue line of the learned Judge, and I adopt the blue line for the residue of the distance. The course which I have stated I have marked with a green line on the large plan.

Then as to the land west of that blue line, or between it and the river, the defendant has lost all claim ever to go beyond it, however much the water may recede or whatever accretions may be made, because he has filled up wrongfully the bed of the bay considerably beyond the water mark, unless he can shew a title by length of possession. His notice of 1863 put an end to any claim which he could make from that time by reason of his acts of throwing material into the bay. His other acts were in 1876 and later, and these are within the statutable period,

even if any use could be made of them as indicating a taking possession by means of so depositing the materials he did at that time. It was a convenience to him to throw away the rocks, stone and earth from his excavation at his nearest convenient point, and because he threw them into the bay it is no more evidence of his meaning to take possession of the place where he so deposited them than if he had deposited them at a spot half a mile distant from it. That the plaintiff saw him doing it and did not forbid it is nothing. He might have been willing to have had the bay there filled up, and that the defendant should shut himself off from the water of the bay if he chose to do so. Nor is the plaintiff concluded from claiming this made land in like manner as he might have been by permitting another, under a mistaken idea by that other of his legal rights, to put up valuable buildings or by laying out a large sum of money in making extensive improvements upon land which he thought was his own, because the defendant, in place of laying out money by this filling up, was saving money by putting his waste stuff where he did, and because the defendant knew he had no title whatever to the place of deposit unless he could make it out by mere length of possession. Then as to the possession west of the blue line the learned Judge has found expressly against him, and very properly so we think. There is no one act shewn to have been done by the defendant, or by any of his tenants, which indicated an intention by him or them to assert a title to the portion west of that line, nor anything whatever done by the plaintiff to shew that he acquiesced in such acts as opposed to his rights and title: *Attorney-General v. Chambers*, 4 DeG. & J. 55.

The rule should be, that a verdict be entered for the plaintiff for the land west of the green line I have drawn on the plan, and for the defendant for the land to the east of the green line.

GALT and OSLER, JJ., concurred.

Rule accordingly.

MEMORANDA.

During this Term the following gentlemen were called to the Bar :—

GEORGE WHITFIELD GROTE, WILLIAM COSBY MAHAFFY,
PATRICK ANDERSON MACDONALD, WILLIAM LAWRENCE,
WILLIAM LEIGH WALSH, JOHN JACOB WHEELER STONE,
COLIN SCOTT RANKIN, HORACE COMFORT, ALEXANDER V.
MCCLENEGHAN, MARTIN SCOTT FRASER, WILLIAM PATTISON,
WILLIAM REUBEN HICKEY, GEORGE MONK GREEN, JAMES
THOMAS PARKES, MICHAEL JAMES GORMAN, HARRY EDMUND
MORPHY, CHARLES AUGUSTUS KINGSTON, JOHN HENRY
LONG, JAMES C. DALRYMPLE, JOHN JACOBS.

IN THE
COURT OF QUEEN'S BENCH
AND THE
COURT OF COMMON PLEAS.

Regulae Generales.

Saturday, the 6th day of March, A.D., 1880.

The following rule was promulgated :—

It is ordered that on and from the first day of next April, so much of the rule of Michaelmas Term, 35 Victoria, and of the Tariff of Fees contained therein as follows :

Fee on argument on supporting or opposing rules on return of rules *nisi* or argument of demurrer, special case, or appeal.....\$10 00

To be increased in the discretion of the Master at Toronto, to a sum not exceeding..... 25 00

Be rescinded ; and that the following provision be inserted in its stead :

Fee on argument on supporting or opposing rules on return of rules *nisi* or argument of demurrer, special case, or appeal.....\$10 00

To be increased, in the discretion of the Master at Toronto, to..... 25 00

And in cases of very special importance and magnitude, in the discretion of the Master at Toronto, to not exceeding, 50 00

(Signed)	JOHN H. HAGARTY.
"	ADAM WILSON.
"	THOMAS GALT.
"	J. D. ARMOUR.
"	M. C. CAMERON.
"	F. OSLER.

SITTINGS IN VACATION

AFTER HILARY TERM.

ATWOOD QUI TAM. V. ROSSER ET AL.

Justices of the Peace—R. S. O. ch. 76, sec. 1.

The effect of R. S. O. ch. 76, sec. 1, is to require justices of the peace, where more than one take part in a conviction, to make an immediate return thereof to the Clerk of the Peace.

Where, therefore, to a declaration alleging a conviction by the defendants, two justices of the peace, and their failure to make an immediate return thereof as required, the defendant pleaded that before action they duly made the return of the said conviction required by law to be made by them: *Held*, that the plea was bad, for that the return therein set up was not a compliance with the statute.

DECLARATION, alleging that the defendants, two Justices of the Peace for the county of Middlesex, had convicted the plaintiff for swearing and using grossly profane language; and that it was the duty of the defendants, being such Justices as aforesaid present and joining in the conviction, to make an immediate return thereof in writing, under their hands, to the Clerk of the Peace of the said county according to the statute, &c.: and alleging as a breach that the defendants neglected to make such immediate return, contrary to the statute, whereby, &c.

Third plea: That before action the defendants duly made the return of the said conviction required by law to be made by them, to the Clerk of the Peace for the said county of Middlesex.

To this plea the plaintiff demurred, on the ground, that the making of the return by the defendants before action, but after the cause of action had accrued for want

of an immediate return, as in the declaration alleged, is no answer to the said declaration.

On February 17, 1880, the demurrer was argued.

Bartram, for the plaintiff.

MacLennan, Q. C., for the defendants.

February 20, 1880. CAMERON, J.—I think the demurrer to the plea is well taken. The effect of R. S. O. ch 76, is to require Justices of the Peace, when more than one take part in a conviction, to make an immediate return of such conviction in the form prescribed by the Act. It was, it appears to me, the intention of the Legislature, that the justices, after making a conviction, should before separating sign the return; and that the penalty imposed by section three of the Act should attach when the return has not been immediately thereafter made. The declaration, therefore, properly alleges that the defendants' duty was to make an immediate return, and properly charges as a breach the not making such immediate return.

The plea, simply alleging that before action the defendants made a return, furnishes no better answer than it would have done had only one Justice of the Peace acted in making the conviction, and the declaration had charged that he had neglected to make a return on or before the second Tuesday in September, as required by the first section. The conviction having been made on the eighteenth day of August, A.D. 1879, and the action having been commenced on the second of January, 1880, there can be no doubt on the second Wednesday in September, a return not having been then made, a right had accrued to any one who chose to sue to recover the penalty.

By section four, all prosecutions for penalties under section three must be brought within six months after the cause of action accrues. What is the cause of action? The neglect to make the return in the manner and within the time prescribed by the first section. If Mr. MacLennan's contention were sound, a cause of action would not arise

until the suit was in fact brought, and it could not be barred because the six months could not begin to run.

In my mind it is clear a return does not prevent the penalty attaching, unless made within the time prescribed by the first section. Judgment must, therefore, be entered for the plaintiff on the demurrer.

Judgment for plaintiff.

SMITH v. BURN ET AL.

Assignment of judgment debt—R. S. O. ch. 116, secs. 2, 3—Surety—Statute of Limitations.

Held, that an assignment of a judgment to a trustee for one of the defendants who had paid the debt, such defendant being surety for another defendant, was valid, notwithstanding it was made six years after such payment and when the surety's direct cause of action against the principal debtor had been barred by the Statute of Limitations.

DECLARATION in an action by way of revivor, by the plaintiff as administrator of the personal estate and effects of Henry J. Noad, deceased, on a judgment for \$1,162.25, recovered by the said Henry J. Noad against the defendants James G. Burn, Ralph Everett, and Ruliff Marsh.

Fourth plea, by James G. Burn : that after the recovery of the said judgment, and before this action, the defendants Ralph Everett and Ruliff Marsh, above named, satisfied and discharged the said judgment by payment thereof.

Replication to the fourth plea : that the said judgment in the writ of revivor mentioned was recovered against the said defendant James G. Burn as maker, and the other defendants as his accommodation endorsers of the promissory note set out in the declaration in that suit, and as his sureties for the due payment thereof: that after the recovery of the said judgment the said Henry J. Noad sued

and prosecuted out of the said Court upon the said judgment, writs of *fieri facias* against the goods and chattels, lands and tenements of all the said defendants, directed to the sheriff of the United Counties of Northumberland and Durham; and thereupon the said defendant Ralph Everett was forced and obliged to, and he did then pay the amount of the said judgment to the said sheriff: that, pursuant to the statute in that behalf, the said Ralph Everett, as such accommodation endorser and surety for the defendant James G. Burn, was entitled to have the said judgment assigned to him, or a trustee for him: and afterwards, at his request and before the issue of the said writ of revivor, the plaintiff, as such administrator, assigned the said judgment to Samuel Sculthorp, as such trustee for the said defendant, Ralph Everett, and the said writ of revivor was issued by the said Ralph Everett in order to obtain indemnification from the defendant James G. Burn for the loss sustained by him in paying the said judgment, as aforesaid, and so the said defendant James G. Burn ought not to be allowed to plead such payment in bar of this proceeding.

Fourth rejoinder to the said replication: that the said Ralph Everett did not make the said payment within six years before the said alleged assignment.

To this rejoinder the plaintiff demurred.

On February 24, 1880, the demurrer was argued.

J. K. Kerr, Q.C., for the plaintiff.

Appelbe, for the defendant.

February 27, 1880. CAMERON, J.—The only question presented and argued before me on this demurrer is, whether an assignment of a judgment to a trustee for one of the defendants, who was a surety for another of the defendants, made six years after the surety had paid the judgment debt to the judgment creditor, could be validly made, the surety's direct cause of action against his principal and co-judgment debtor having been barred by the Statute of Limitations.

By sec. 2 of the Mercantile Amendment Act, R. S. O.

ch. 116, it is declared : " Every person who, being surety for the debt or duty of another * * pays such debt or performs such duty, shall be entitled to have assigned to him, or a trustee for him, every judgment, specialty, or other security which is held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security be or be not deemed at law to have been satisfied by the payment of the debt or performance of the duty."

And by sec. 3, " Such person shall be entitled to stand in the place of the creditor and to use all the remedies and, if need be and on proper indemnity, to use the name of the creditor in any action or other proceeding at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who has so paid such debt or performed such duty; and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him."

Batchellor v. Lawrence, 9 C. B. N. S. 543, is an express authority that a surety on [a judgment recovered against him and the principal in the original contract, in respect of which he became surety, may enforce the judgment for his own benefit. Thus, in effect, the judgment becomes a judgment in his favour against the principal, and renders a suit to recover from the principal the amount paid for him unnecessary. Consequently, his right to enforce the judgment would not be interfered with by the lapse of any time that would not bar the judgment itself.

If, therefore, the judgment in question could be properly revived in the name of the administrator, as to which, no exception having been taken to the writ of revivor on that ground, I express no opinion, the rejoinder to the replication pleaded is no answer, and judgment must be for the plaintiff on the demurrer.

Judgment for plaintiff.

THE GRAND JUNCTION RAILWAY COMPANY V. POPE ET AL.

Principal and surety—Guarantee—Pleading.

Declaration alleged that the defendants by agreement under seal had agreed to become sureties for the performance of a contract made by one B. with the plaintiffs, whereby B. covenanted to purchase and provide all the lands required for, and to build and maintain the plaintiffs' railway from Belleville to Lindsay, and to deliver it over completed by a day named, &c., and to indemnify the plaintiffs against all claims, &c., for lands taken and damage done thereto, and from all acts, omissions, and defaults which would give rise to claims against the plaintiffs, alleging as distinct breaches default by B. in the performance of each of the covenants so entered into by him, whereby &c.

Fifth plea: that plaintiffs mortgaged and otherwise incumbered the said road, and thereby released the sureties: *Held*, bad, as it did not appear how the incumbrances prejudiced the principal in the performance of the contract.

Sixth plea: that the plaintiffs altered the conditions of the contract by allotting to the principal a large quantity of stock in the company, and thereby released the defendants: *Held*, bad, in not shewing how the allotment altered the contract.

Ninth plea: that the plaintiffs sustained no loss or damage by B.'s default: *Held*, bad, for that the defendants' contract was not merely one of indemnity, but also for the performance by B. of certain specified acts, and non-performance of both was alleged.

Tenth plea: that after the breaches the plaintiffs, by by-law, rescinded the contract: *Held*, bad, as being no answer to the cause of action created by the breaches alleged.

DECLARATION: that the defendants by an agreement under seal, had agreed to become sureties for the performance of a certain contract, made by one Brooks with the plaintiffs, whereby the said Brooks covenanted to purchase and provide all the lands required for, and to build, and construct the section of the plaintiffs' railway, from Belleville to Lindsay, both places inclusive, together with all stations, bridges, &c., according to the specifications, &c., and to deliver the whole work, and the road completed, by a day named, and to make a good title to all lands required for the said railway and works, and to be at the cost of the engineering and location, &c., and of getting the land and procuring the title thereto; and that he, the said Brooks, would protect and indemnify the plaintiffs from all claims, &c., for lands taken and damages done to any land or property in the course of the works, and would indemnify

and save harmless the company from all acts, omissions, and defaults which would give rise to claims against the company arising out of the works or the making thereof; alleging as distinct breaches, default by the said Brooks in the performance of each of the covenants so entered into by him, whereby, &c.

Fifth plea: that after the making of the said agreement the plaintiffs mortgaged and otherwise encumbered the said road, the subject of the said contract, and thereby released the said sureties.

Sixth plea: that after the making of the said agreement and the said contract, and before the breaches alleged, the plaintiffs altered the conditions of said contract by allotting to the said Brooks a large amount of stock of the said company, and thereby released the said sureties.

Ninth plea: that the plaintiffs sustained no loss or damage by or through the default of the said Brooks.

Tenth plea: that after the breaches in the declaration alleged on the part of the said A. Brooks, the plaintiffs by by-law rescinded the said contract, and thereby released the sureties.

To these pleas the plaintiff demurred, on the following grounds:

To the fifth plea: that it discloses no defence to this action. The creation of a mortgage or incumbrance on the said railroad by the plaintiffs, would not release the said sureties; and certainly would not do so if the plaintiffs were prepared to convey an unencumbered title by a first mortgage when the obligation to do so under the said contract arose, and it is not alleged that they were not so prepared.

To the sixth plea: that the allotting to the said Brooks of the said stock was not an alteration of the conditions of the said contract so as to release the said sureties, and no defence to this action is shewn by the said plea.

To the ninth plea: that the said plea is no answer to the causes of action in the declaration, and is only pleaded to the damages.

To the tenth plea: that a rescission of the said contract after the breach does not release the said sureties, and is no answer to this action.

On February 24, 1880, the demurrs were argued.

Appelbe for the plaintiffs.

Robinson, Q.C., for the defendants.

March 2, 1880. CAMERON, J.—I think all the pleas demurred to bad as furnishing no answer to the cause of action alleged in the declaration.

The fifth plea simply alleges that the plaintiffs mortgaged and otherwise encumbered the road (railway), without shewing in any way how it prevented the performance by the principal of his contract. It is no more an answer for all that appears to the cause of action declared on, than it would be for A. B., who had entered into a contract with C. D. to build a house upon a particular lot of land, to set up that C. D. after making the contract mortgaged the land, as an excuse for not building.

The sixth plea appears equally bald. It alleges that the plaintiffs altered the conditions of the contract by allotting to the principal a large quantity of stock in the company and thereby released the defendant. A simple allegation that the plaintiffs and the principals altered the conditions of the contract might have sufficed; but when it is alleged that the alteration complained of was by allotting shares in the company, the contract as far as set out showing no reason why the allotting of shares in the company should have the effect of altering the conditions thereof, there should be some averment setting forth how the contract was affected by the allotment. Without this the plea is clearly no answer to the causes of action alleged.

The ninth plea Mr. Robinson endeavoured to sustain on the ground that the contract of the defendants was one of indemnity merely against any loss the plaintiffs might sustain by failure of the principal to perform his

contract, but the contract in terms is not one of mere indemnity. It is that the principal would do certain specified things, and also would indemnify plaintiffs against loss. The failure to perform these things is alleged in several distinct breaches, with an additional breach that defendants did not indemnify the plaintiffs. The plea is therefore not an answer to the breaches, and is bad as to all except that relating to the indemnity.

The tenth plea alleges a rescission of the contract *after* the breach, and therefore furnishes no answer to the causes of action created by the breaches alleged.

The judgment should be for plaintiffs on all the demurers to the several pleas, with leave to the defendants to apply in Chambers for leave to amend.

Judgment for plaintiffs.

A DIGEST
OF
ALL THE REPORTED CASES
DECIDED IN

THE COURT OF COMMON PLEAS,

FROM MICHAELMAS TERM, 42 VICTORIA, TO MICHAELMAS TERM, 43 VICTORIA.

ABORTION.

See CRIMINAL LAW, 2.

ACCIDENT.

Termination of voyage by—Claim for freight.]—See INSURANCE, 8.

See NEW TRIAL—RAILWAYS, 2—WAYS, 2, 3.

ACQUITTAL.

Date of.]—See MALICIOUS ARREST.

ADMINISTRATION OF JUSTICE ACT.

See ARBITRATION — PRINCIPAL AND AGENT—WORK AND LABOUR.

ADULTERY.

See DEFAMATION, 2.
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AFFIDAVIT.

Bona fides.]—See CHATTEL MORTGAGE, 1.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

ALTERATION.

Of place of payment—Effect of.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.

AMENDMENT.

Adding co-plaintiffs having adverse title—A. J. Act.]—See ARBITRATION, 1.

See BILLS OF LADING—WORK AND LABOUR.

ANTECEDENT DEBT.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 4.

APPEAL.

Right of—Reference by consent.]—See INSURANCE, 5.

See FOREIGN LAW.

APPEARANCE.

See FOREIGN LAW.

APPOINTMENT.

See JUDGE—POLICE MAGISTRATE

APPROPRIATION OF PAYMENTS.

Partnership and individual liability—New trial—Evidence.]—The defendants McC. & McL., while in partnership, purchased goods from the plaintiff. Subsequently they dissolved partnership, McC. continuing the business and taking over the assets which included a considerable portion of these goods, and thereafter McC. purchased goods from the plaintiff on his own behalf, and from time to time made payments to the plaintiff with moneys partly his own and partly the proceeds of the partnership goods. The plaintiff sued defendants for the balance due upon the goods furnished to the firm, and the question was, whether the payments so made were to be applied on the individual or the partnership indebtedness. It was alleged that the evidence shewed that there was a specific appropriation to McC.'s

individual account, in accordance with a stipulation between plaintiff and himself therefor, and that McL. was not only aware of such appropriation and assented thereto, but that he expressly agreed for valuable consideration to pay off the partnership indebtedness; and also that the partnership were indebted to McC. in a sum beyond the payments made, and that McC. could therefore properly apply the payments to his own indebtedness. The payments were made in advance of the falling due of the items of McC.'s separate account, but evidence was given in explanation of this.

The jury having found for the defendants, a new trial was granted to enable the facts to be more fully considered; and *Semble*, that the plaintiff was entitled to succeed.—*Fitch v. McCrimmon et al.*, 183.

See INSURANCE, 3.

ARBITRATION.

1. Ejectment—Amendment by adding co-plaintiffs having adverse title—Powers of arbitrator—A. J. Act—Motion to set aside order.]—In ejectment plaintiff claimed as assignee of M. of a mortgage made by C., and the substantial defence was that the mortgage had been paid, or, if not, that the defendant should be allowed to redeem. At the trial the cause, by consent, was referred to an arbitrator with the powers of a Judge at Nisi Prius, as to adding parties, &c. After the reference had been entered upon it was discovered that there had been a previous assignment to E. W. and J. W., whom, although their title was adverse to the plaintiff, on their consenting thereto, and after notice to defendant, the arbi-

trator ordered to be added as co-plaintiffs. On motion by the defendant to set aside the order, but without shewing that he was in any way prejudiced thereby :

Held, by OSLER, J., that under the A. J. Act, 36 Vic. ch. 8, O., R. S. O. ch. 49, the arbitrator had power to make the amendment, and that it was properly made, as it caused complete and final justice to be done in the action.

Held, also, that even if, under the circumstances, the amendment was improper, the motion should have been to revoke the submission.—*Wright v. Creighton*, 5.

2. *Making submission a rule of Court—Reception of evidence in the absence of party—Setting aside award.*]—Where there was a written submission of existing differences to the award of an arbitrator to be appointed by a person named in the submission, and in pursuance thereof such person verbally appointed the arbitrator who entered upon the reference and made his award.

Held, that the submission could not be deemed to be a parol submission, merely because the arbitrator was appointed verbally, and that the submission was properly made a rule of Court.

In this case the arbitrator having received statements and information upon the subject in dispute, in the absence of one of the parties, without communicating to him that he had done so, the award was set aside, with costs.—*Re Cruickshank and Corby*, 466.

This case was carried to the Court of Appeal, but the Court being equally divided, the appeal was dismissed.

Action on policy—Reference by consent—Right of appeal.]—See INSURANCE, 5.

Execution of award by two of three arbitrators—Validity of.]—See RAILWAYS, 1.

ARCHITECT.

Certificate of.]—See WORK AND LABOUR.

ARREST.

See MALICIOUS ARREST.

ASHES.

Depositing on street.]—See WAYS, 3.

ASSAULT.

See CRIMINAL LAW, 1.

ASSIGNMENT.

Of judgment debt.]—See PRINCIPAL AND SURETY, 2.

ATTORNEY.

See FOREIGN LAW.

AUDIT.

See INSURANCE, 3—SHERIFF.

AWARD.

See ARBITRATION.

BANK BILLS.

See BANKS, 2.

BANKS.

1. Deposit receipt—Endorsement—Payment after death of depositor without notice—Effect of death as revocation of authority to pay—Pleading.]—Action by plaintiff as administratrix of one L., to recover the sum of \$100 deposited by L. in his lifetime with defendants.

Second plea: That the moneys were claimed under a deposit receipt, which, after L.'s death and before defendants had any notice or knowledge thereof, was duly presented to defendants properly endorsed by L., and defendants in due course of business and in their usual mode of dealing with such receipts, paid the sum mentioned therein to the person presenting the same with L.'s endorsement thereon, and defendants took up and ever since held the same, as they were entitled to do.

Third plea: After stating that the moneys were claimed under the deposit receipt, alleged that L. in his lifetime endorsed and delivered said receipt to B. L., his wife and afterwards his widow, who being possessed thereof by virtue of the endorsement, presented it to the defendants, who, without any notice or knowledge of L.'s death, duly paid the same to her,

Held, second plea bad, for there was no allegation of the delivery of the receipt, or of any intention to pass the property therein, the expression, "indorse," which in negotiable instruments, imports a delivery and transfer to the endorsee so as to pass the title thereto, having no such effect in a non-negotiable instrument of this character; further, that the allegation of payment in ignorance of L.'s death, and in due course of business, &c., could not help defendants, and the plea should have

alleged a payment to L.'s personal representative or to some person shewing a right to the money.

Held, also, third plea bad: That it did not constitute a good legal defence, for notwithstanding the alleged endorsement and delivery, the depositor still continued entitled to the money; neither did it constitute a defence in equity, for it alleged neither an equitable assignment of the receipt or of the money secured thereby, nor a *donatio mortis causa*, nor a gift thereof.—*Lee, Administrator, v. Bank of British North America*, 255.

2. Bank bills—Payment—Subsequent failure of bank—Tender back within reasonable time—Notice of dishonour.]—A person receiving bank notes in payment of property, or in exchange for cash, or on deposit to the credit of the payer, has the right in case of failure of the bank, to return the notes, if he does so within a proper time after receipt.

In this case the plaintiff deposited \$1,000 of the notes of the Mechanics' Bank which he believed to be good, to his credit with defendants, at Stratford, on the 28th May, about 11 a.m. About 4 p.m., defendants' agent at Stratford became aware that the Mechanics' Bank had stopped payment. On the following day he sent these bills to defendants at Montreal where the Mechanics' Bank had their head quarters, and on the 31st he charged the amount to the plaintiff, having informed him on the evening of the 30th, that he would do so.

Held that defendants should have tendered back the notes to the plaintiff on the 28th or 29th: that for the want of such tender they had made them their own; and the plaintiff was therefore entitled to recover.

Quære, whether, if the defendants had presented the notes for payment at the Bank at Montreal on the 29th or 30th, and had given the plaintiff notice of dishonour on the 30th or 31st, it would have been sufficient, without tendering the notes back.—*Conn v. The Merchants' Bank of Canada*, 380.

BARRISTERS CALLED.

193, 349, 465, 626.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Promissory note—Notice of protest—Proof of sending—New trial.*]—To prove notice of dishonour to defendant, an indorsee of a note, the receipt of which he denied, the notary's clerk stated that he had no independent recollection of the matter, but that he had no doubt of having mailed the notice to the address given by the defendant from the statement to that effect in the protest, which was in his hand writing, and from the entries in the notarial register kept in the office, which was produced, and which contained the particulars of the entry, and the day and hour of mailing the notices. His practice, he said, was to make the entry just before mailing, when he would look at his watch, note the time, and then go to the post office.

Held, sufficient evidence of the mailing of such notice, and the jury having found for the defendant, a new trial was ordered.—*Merchants Bank of Canada v. Macdougall*, 236.

2. *Promissory note—Duress—Consideration—Compromise of crim-*

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inal charge.]—The defendant C. being in prison in due course of law on a charge of assaulting the plaintiff, for which an indictment was laid against him charging him with an assault occasioning actual bodily harm, and with common assault, and a civil action for the assault having also been brought against him, a settlement was effected by defendant C. giving a note endorsed by defendant B., for \$1,000 for the damages sustained by plaintiff, which was held not to be disproportionate to the injury sustained, and a fine was inflicted for common assault merely, the former charge in the indictment being withdrawn. The settlement was made and the note accepted by plaintiff at defendant's instance, and under the sanction and advice of his counsel, without plaintiff having urged it or taken advantage of the imprisonment to procure it, and the Judge, in sentencing defendant, forbore to imprison because defendant had made compensation to the plaintiff. To an action on the note, the defendants set up fraud, duress, and illegality of consideration.

Held, that the plaintiff was entitled to recover: that there was no evidence of fraud; nor under the circumstances could there be deemed to be duress; and further, that there was no illegality of consideration, for the settlement was merely of the plaintiff's private damage, and in no way effected the public interest, the law having been vindicated by the imposition of substantial punishment.—*Kneeshaw v. Collier et al.*, 265.

3. *Promissory note—Alteration of place of payment—Validity—C. S. U. C. ch. 42.*]—In an action on a promissory note it appeared that the

note when made and signed by the defendant was dated at Watford and payable to the plaintiff's order at the "Thomas Fawcitt's Bank, Watford," and without the defendant's knowledge or consent was altered by dating it at Alvinston, and making it payable "at my" defendant's "place of business, Alvinston": Held, such a material alteration as avoided the note.—*McQueen v. McIntyre*, 426.

4. Promissory note—Consideration
—Antecedent debt.]—Held, that an antecedent debt is a good consideration for a note transferred as collateral security for the debt, so as to enable a *bona fide* holder without notice to enforce it though void for illegality as between the maker and payee.—*Canadian Bank of Commerce v. Gurley et al.*, 583.

See BANKS, 2—PARTNERSHIP.

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BILLS OF LADING.

Warehouse receipt—Continuing guarantee—Trover—Wharfage—Money had and received.]—The defendants, a bank, advanced to F. & McL. \$2,250, on a warehouse receipt for 3,000 bushels of wheat, valued at 75c. per bushel. F. & McL. subsequently paid in \$1,920, which they had obtained from the plaintiffs, who were in reality the owners of the wheat, for whom F. & McL. were acting, leaving a balance due of \$330. The plaintiffs notified the bank of their claim, but the bank in disregard thereof, contending that the warehouse receipt was a continuing security for F. & McL.'s general balance, which at that time exceeded \$2,250, shipped it off for sale, incurring

wharfage fees thereby, and the whole of the wheat was sold.

Held, that the evidence, set out in the case, shewed that the warehouse receipt was not a continuing security to \$2,250, but only for the repayment of that specific sum.

Held, also, that under the circumstances the claim for wharfage could not be entertained.

Held, also, that plaintiffs might maintain trover against defendants; for that the fact of their being some part of the \$2,250 due at the time of the sale, did not justify the sale of whole of the wheat, it being capable of division, so that enough to satisfy the amount due need only have been sold.

Held, also, that even if trover was not maintainable, leave would now be granted to add a count for money had and received, the contest at the trial being as to whether there was a continuing security, and not as to the form of the action.—*Gibbs et al. v. Dominion Bank*, 36.

BIRTH.

Concealing.]—*See CRIMINAL LAW, 3.*

BOND.

See FRAUD—GUARANTEE—RAILWAYS, 1.

BRIDGE.

Highways—Contract with Dominion Government—Necessity for cutting away a highway—Specifications—Requirements of—Temporary bridge—Sufficiency of—Jurisdiction.]—Under a contract made between defendants and the Government for the

performance of certain work on the Welland Canal, a Government work, it being necessary to cut away the public highway, the specifications, in accordance with the Act 31 Vic. ch. 12, sec. 29, D., provided that before such highway was cut away or disturbed the defendants should provide another and satisfactory means for the public travel, and were to be held legally liable for keeping the crossing so that it could be safely used. The defendants under these powers erected a temporary bridge, being allowed by the Government \$800 therefor, of which they did not expend more than half, although they paid something besides for the approach to the bridge. In an action by the plaintiffs for the alleged insufficiency of the bridge for its intended purpose in consequence of which the plaintiffs were injured, the jury were directed that the defendants were only required to erect a temporary bridge of the like nature which a municipality would need to make while a permanent bridge was being repaired or rebuilt.

Held, that the direction was insufficient : that the jury should have been told that although a temporary bridge need not be constructed in the same manner, and with the same care and finish or materials as a permanent bridge, yet equally therewith it must be constructed and maintained so as to be a safe and strong roadway for the public travel; and they should be asked whether the bridge in question was of this character—*McColl et ux. v. Higgins et al.*, 43.

BUILDING CONTRACT.

See WORK AND LABOUR.

BUILDINGS.

Contiguous—Distance of.]—See INSURANCE, 4.

BY-LAWS.

See WAYS, 1.

CANCELLATION.

Of insurance.]—See INSURANCE, 5.

CERTIFICATE.

[Architects.]—See WORK AND LABOUR.

CHATTEL MORTGAGE.

1. *Present advance — Purchase by mortgagee at bailiff's sale — Effect of — Affidavit of bona fides by joint mortgagee.]—F. owed the plaintiff and M. \$200 and \$100 respectively for goods supplied to them, and had given a chattel mortgage on his property to Flint for \$600. Being pressed by Flint, he applied to the plaintiff and M. for the money, offering them a chattel mortgage therefor as well as for what he already owed them, which they agreed to, but not having the money at the time, they borrowed it from J., giving him their note endorsed by F., and Flint was paid off and his mortgage discharged. F. gave to the plaintiff and M. the mortgage in question, which was in the usual form, the expressed consideration being \$900 ; the affidavit of bona fides was made by the plaintiff alone, and stated that the mortgagor was justly and truly indebted to him and M. as the mortgagees therein named*

in the sum of \$900 mentioned therein, &c. On the renewal of the mortgage the affidavit was made by plaintiff in like manner. The plaintiff and M. were not connected in business. The note was renewed several times, F. being a party to only one of the renewals. Some months after the mortgage was given the plaintiff and M., to protect themselves, bought in the goods at a bailiff's sale for rent and taxes, and they were subsequently seized on an execution at the defendant's suit, when the plaintiff and M. claimed, and an interpleader was directed.

Held, that the mortgage was valid; that the evidence, more fully set out in the case, shewed that it was given for a present advance by the mortgagees, and not merely as security for a liability incurred as accommodation makers of the note, so as to bring the transaction within sec. 6 of the Chattel Mortgage Act.

Held, also, that the fact of part of the consideration of the mortgage consisting of separate debts to the plaintiff and M. did not prevent the plaintiff making the affidavit of *bona fides*, the first section of the Act not being limited to cases of joint mortgagees connected in business, &c.

Held, also that the plaintiff and M. acquired a good title as purchasers at the bailiff's sale, and that such sale was not within the Act so as to require the registration of a bill of sale, or an actual and continued change of possession; but, *Semble*, that the plaintiff and M. could also rely on the mortgage.

Held, therefore, that plaintiff and M. were entitled to recover.—*Severn v. Clarke*, 363.

2. *Absence of redemission clause—Seizure and sale before default—Action for preventing the mort-*

gagor redeeming — Trespass — Trover.]—A chattel mortgage in the usual form on certain goods to secure the payment of \$1,700 by half yearly instalments, contained no redemission clause. It was provided, however, that on default of payment, &c., or in case of the mortgagor attempting to sell or part with the possession of the goods without the mortgagee's consent in writing, &c., the mortgagee might enter and take the goods, and sell the same; and also on default of payment the mortgagee might distrain; and further, that it should not be incumbent on the mortgagee to sell and dispose of the goods, but in case of said default should peaceably and quietly have, hold, and occupy the said goods without the let, &c., of the mortgagor. Before any default was made the mortgagee entered and seized and sold the goods, for which the mortgagor brought an action, the first and second counts being in trespass and trover, and the third count being for seizing and selling the goods without the plaintiff's consent before default made, whereby the plaintiff was deprived of his right to redeem, &c.

Held, that the plaintiff was entitled to recover on the third count, the plaintiff being entitled to the restitution of his property on the performance of the condition on which he mortgaged it, which the mortgagee by his wrongful act had prevented from being accomplished.

Semble, per WILSON, C. J., disapproving of *Porter v. Flintoff*, 6 C. P. 340, and the cases following it, that there was an implied right to possession until default, and therefore the plaintiff was entitled to recover in trespass and trover—*Bingham v. Bettinson*, 438.

CHEQUE.

See PARTNERSHIP.

CHILD.

Concealing birth of.]—See CRIMINAL LAW, 3.

CITY.

*Justice signing conviction in, when made in county.]—See JUSTICE OF THE PEACE, 2.**See POLICE MAGISTRATE.*

CLAIM.

Proof of.]—See INSOLVENCY, 4.

COLLATERAL SECURITY.

See CORPORATIONS.

COMMON ASSAULT.

See CRIMINAL LAW, 1.

COMPANY.

See CORPORATIONS.

COMPENSATION.

*For lands taken.]—See RAILWAYS, 1, 3.**On closing up road.]—See WAYS, 1.*

COMPOSITION.

Deed of.]—See INSOLVENCY, 4.

COMPROMISE.

Of criminal charge.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

CONCEALMENT.

Of birth of child.]—See CRIMINAL LAW, 3.

CONDITIONS.

*Statutory.]—See INSURANCE, 1, 4.**Reasonable.]—See INSURANCE, 3, 4.*

CONSIDERATION.

*Immoral.]—See CONTRACT.**Illegal.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2, 4.**Antecedent debt.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 4.*

CONTRACT.

*Agreement to convey land—Immoral consideration—Lien for improvements.]—In ejectment the defendant set up a claim to the land under an agreement, which was based upon the immoral consideration of his marriage with the daughter of the plaintiffs' testator, who, as he was aware, was already married, praying specific performance of the agreement, and for the execution of a conveyance of the land, or for a lien for the improvements made by him on the faith of such agreement.**Held, the agreement could not be enforced, nor could there be any lien for the improvements so made.—*Moon et al. v. Clarke*, 417.**See BRIDGE—SALE OF GOODS—WORK AND LABOUR.*

CONTRIBUTORY NEGLIGENCE.

See RAILWAYS, 2—WAYS, 2.

CONVEYANCE.

See DEED.

CONVICTION.

Made in county—Justices signing in city—Validity of.]—See JUSTICE OF THE PEACE, 2.

Return of.]—See JUSTICE OF THE PEACE, 3.

CO-OWNERSHIP.

See PRINCIPAL AND AGENT.

CORPORATIONS.

Sci. fa.—Company incorporated under 27-28 Vic. ch. 23—Transfer of stock as collateral security—Necessity for statement thereof in books of company and in transfer.]—In an action by way of sci. fa. by plaintiff, a judgment creditor of the Ontario Wood Pavement Company incorporated under 27 & 28 Vic. ch. 23, against defendant as a shareholder thereof for unpaid stock, it appeared by oral evidence that the stock was transferred by one A. to defendant as collateral security for a debt due defendant by A., but the transfer was on its face absolute, and there was nothing in the books of the company to shew that A. had any interest in it.

Held, that the fact of the stock being transferred as collateral security should have appeared in the

books of the company ; and, *Semble*, also in the transfer itself.

Held, therefore, that the defendant was liable, inasmuch as he was informed and knew that the shares were in fact unpaid, although they were entered in the company's books and in the certificate as fully paid up.—Page v. Austin, 108.

See INSOLVENCY, 3—INSURANCE, 6—MUNICIPAL CORPORATIONS.

CORRUPT BARGAIN.

See PARLIAMENT.

COSTS.

Tariff of fees.]—See RULES OF COURT.

See MALICIOUS ARREST.—PARLIAMENT.

COUNCILLOR.

Right to vote when interested.]—See WAYS, 1.

COUNTY.

Conviction made in—Justice signing in city.]—See JUSTICE OF THE PEACE, 2.

See POLICE MAGISTRATE.

COUNTY AUDITORS.

See INSURANCE, 3—SHERIFF.

CRIMES.

See CRIMINAL LAW.

CRIMINAL LAW.

1. *Evidence of prisoner in criminal cases*—41 Vic. ch. 18, sec. 1, D.—*Common assault.*]—Where a prisoner was indicted under 32 & 33 Vic. ch. 20 sec. 47, D., for an assault occasioning actual bodily harm : *Held*, that he could not be deemed to be on his trial on an indictment for a common assault, so as to entitle him to be admitted and give evidence as witness on his own behalf, under 41 Vic. ch. 18 sec. 1, D.—*Regina v. Bonter*, 19.

2. *Criminal law—Supplying noxious thing with intent to procure abortion*—33 & 34 Vic. ch. 20 sec. 60, D.]—The prisoner with intent to procure abortion, supplied a pregnant woman with two bottlesfull of Sir James Clarke's Female Pills, with directions to take 25 at a dose and that it would have that effect. The pills contained oil of savin, an article used to procure abortion, and it was said that a bottleful would contain about four grains, but the evidence was not very clear as to this. It was in evidence that such a quantity would be greatly irritating to a pregnant woman, and might possibly procure an abortion, and that oil of savin in any dose would be most dangerous to give to a woman in that condition.

Held, under the circumstances, there was a supplying of a noxious thing within the meaning of the Act 33 & 34 Vic. ch. 20, sec. 60, D., with the intent to procure an abortion.—*Regina v. Stitt*, 30.

3. *Concealment of birth of child—Evidence—Sufficiency of.*]—On an indictment for concealing the birth of a child, it appeared that the prisoner, who lived alone, had placed the dead

body of the child behind a trunk in the room she occupied, between the trunk and the wall. On being charged with having had a child, she denied it, saying she was suffering from cramps, and it was only after the doctor who was called in had informed her that he knew she had been delivered of a child, and on being pressed by one of the women present, that she pointed out where the body was, and the woman went and got it. Until so pointed out the body could not be seen by any one in the room.

Held, that the evidence, more fully set out in the case, was sufficient to go to a jury, and the County Court Judge, before whom the prisoner was tried by her consent without a jury, having found her guilty, the Court refused to interfere.—*Regina v. Pichè*, 409.

Compromise of criminal charge.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

See DEFAMATION, 2.

CROWN PATENT.

Patent from Crown—Construction of—Fee simple—Statute of uses.]—By a patent from the Crown, after a recital of one J. L. having contracted for the purchase of certain land from the Crown Lands Department at a price specified, the land, in consideration of the payment of the sum by J. L., was granted “to the said J. L. upon the conditions below stated,” &c. : “To have and to hold to the said J. L., for the use and benefit of herself and children, Margaret, Robert, and Mary, their heirs and assigns for ever. And also to have and to hold the said parcel or tract of land hereby granted,” &c., “unto

the said J. L., upon the conditions above stated, her heirs and assigns for ever."

Held, that in order to carry out the intent of the Crown, the second *habendum* must be transposed, and read as the first, and thereby a fee simple under the Statute of Uses was created in J. L. and her three children named, as the grantees of the first use declared.—*Long et al. v. Anderson*, 516.

See DEED, 1.

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DAMAGES.

Excessive.]—See DEFAMATION, 1—HUSBAND AND WIFE—MALICIOUS ARREST.

Smallness of.]—See NEW TRIAL.

Special.]—See DEFAMATION, 2.

See SALE OF GOODS.

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DEATH.

Effect of as revocation of authority to pay deposit receipt.]—See BANKS, 1.

—

DEBENTURES.

See INSURANCE, 6.

—

DEBT.

Antecedent—Consideration for promissory note.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 4.

Equitable debt.]—See INSOLVENCY, 2.

Assignment of judgment debt.]—See PRINCIPAL AND SURETY, 2.

DEED.

*1. Ejectment—Lands included in patent—General and particular description — *Falsa demonstratio.*]—Ejectment to recover a piece of land claimed by the plaintiff as part of the south half of lot 23 in the tenth concession of the township of Clinton, as being included in the patent thereof from the Crown, and by the defendant as ungranted land lying between the western boundary of the lot and the township line. No original field notes could be found, but according to the official plans lot 23 appeared to extend to the township line, and there was no evidence of any work on the ground inconsistent therewith; and it also appeared that the government had never made any claim to this piece as ungranted land, but on the contrary had always assumed it to have been included in the patent of lot 23. In the patent there was a general description of the lot as lot 23 in the 10th concession, &c., and also a particular description by metes and bounds, which would exclude the part in question from the limits of lot 23.*

Held, that the plaintiff was entitled to recover, for that the piece in question passed under the general description in the patent, and that the particular description which was inconsistent therewith must be rejected as *falsa demonstratio.*—*Huntsman v. Lynd*, 100.

2. Deed—Construction—Surplusage—Possession.]—In ejectment a deed under which the plaintiff claimed was stated to be an indenture made at Quebec, in Lower Canada, between G. of the one part, "H accepting hereof for and on behalf of" T. of the other part. The consideration was declared to have been

paid by T., and the grant of the land was to him, as was also the *habendum*. The covenants, including one for further assurance, were also made with T. The deed, however, was signed by G. and H.

Held, that in order to give effect to the deed in every particular, according to the plain intent of the parties, the words, "H. accepting hereof for and on behalf of," must be struck out as surplusage and repugnant to the rest of the deed, and thereby the whole conveyance was made operative as a conveyance to T., the signature of H. to the deed being of no consequence not being necessary in the conveyance.

Held, also, that in any event the plaintiff must recover, for that even if the deed could not be sustained in law as conveying a perfect title to T., it would be deemed to be a license to T. to enter upon the land, and he claiming it as his own had sold to a purchaser from whom a good possessory title was shewn.—*Elliott v. Douglas*, 398.

Of composition and discharge.]—See INSOLVENCY, 5.

Tender of.]—See RAILWAYS, 1, 3.

See CROWN PATENT—JUSTICE OF THE PEACE, 1—REGISTRY LAWS—WATER.

DEFAMATION.

1. Libel—Charge of imposition by selling goods at high prices—Excessive damages—New trial.]—The libel sued for herein consisted of the statement, in substance, that the plaintiffs who were manufacturers of lightning rods, were charging from 37 to 42½c. per foot for their rods, whereas the defendant could furnish the same

and even a better rod for 7c. to 10c. per foot, and that defendant having a thorough knowledge of the lightning rod business, felt it to be an imposition practised by plaintiffs on the public in charging such exorbitant prices when the rods could be sold at the above low prices. The publication was proved to be untrue, in that the prices charged by the plaintiffs included the cost of erecting the rod, while the sums named by the defendant only included the price of the rod, although the publication, as the jury found, was intended to convey the meaning that they included the cost of erecting it also.

Held, that the action was maintainable.

The jury assessed the damages at \$4,000, but the Court being of opinion that under the circumstances, the damages were excessive, directed a new trial unless the plaintiffs would consent to reduce the verdict to \$1,000.—*Ontario Copper Lightning Rod Co. v. Hewitt*, 172.

2. Slander—Charge of incest—Special damage.]—In an action for oral slander the words spoken imputed to the plaintiff that he had committed incest and adultery with his daughter, and alleged as grounds of special damage the loss of the society of friends, and illness and expenses consequent thereon :

Held, that the words were not actionable without proof of special damage, incest not being a crime cognizable in our Courts; and that the special damage alleged here was insufficient.—*Palmer v. Solmes*, 481.

DEPARTURE.

In pleading.]—See INSURANCE, 1.

DEPOSIT RECEIPT.

See BANKS, 1.

DESCRIPTION.

Of lands.]—See DEED—RAILWAYS, 1.

DIAGRAM.

See INSURANCE, 4.

DISCHARGE.

See INSOLVENCY, 4.

DISHONOUR.

Notice of.]—See BANKS, 2.

DISMISSAL.

Wrongful.]—See WORK AND LABOUR.

DITCH.

See WAYS, 2.

DOMINION GOVERNMENT.

Contract with.]—See BRIDGE.

DONATIO MORTIS CAUSA.

See BANKS, 1.

DURESS.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

EASEMENT.

See RAILWAYS, 1.

EJECTMENT.

See ARBITRATION, 1—DEED—LIMITATIONS, STATUTE OF.

ELECTIONS.

See PARLIAMENT.

ENDORSEMENT.

See BANKS, 1.

EQUITABLE DEBT.

See INSOLVENCY, 2.

EQUITABLE DEFENCE.

See BANKS, 1—SALE OF GOODS.

ESTATE.

*Equitable—Wife's—Tenancy in common.]—See JUSTICE OF THE PEACE, 1.**See CROWN PATENT.*

EVIDENCE.

*Reception of in absence of adverse party—Setting aside award.]—See ARBITRATION, 2.**Of prisoner on his own behalf.]—See CRIMINAL LAW, 1.**Admissibility of.]—See JUSTICE OF THE PEACE, 2.*

*Leave in term to supply.]—See
LIMITATIONS, STATUTE OF, 1.*

*Reception of improper.]—See JUS-
TICE OF THE PEACE, 1.*

Parol.]—See SALE OF GOODS.

*See APPROPRIATION OF PAYMENTS
—BILLS OF EXCHANGE AND PRO-
MISSORY NOTES, 1—BILLS OF LADING
—CRIMINAL LAW, 3—FOREIGN LAW
—FRAUD—HUSBAND AND WIFE—
INSOLVENCY, 1, 4—INSURANCE, 5, 8
—MALICIOUS ARREST—PARLIAMENT
—PRINCIPAL AND AGENT—REGISTRY
LAWS.*

EXCESSIVE DAMAGES.

See DAMAGES.

EXECUTION.

See INSURANCE, 2.

EXECUTORS AND ADMIN- ISTRATORS.

See BANKS, 1.

FALSA DEMONSTRATIO.

See DEED, 1.

FALSE REPRESENTATION.

See FRAUD.

· FEE SIMPLE.

See CROWN PATENT.

FEES.

Tariff of.]—See RULES OF COURT.

*See POLICE MAGISTRATE—PRIN-
CIPAL AND SURETY, 1.—SHERIFF.*

FELONY.

*Compromise of criminal charge].—
See BILLS OF EXCHANGE AND PRO-
MISSORY NOTES, 2.*

FENCES.

See WAYS, 2.

FIRE INSURANCE.

See INSURANCE.

FOREIGN JUDGMENT.

See FOREIGN LAW.

FOREIGN LAW.

Foreign judgment—Appearance by attorney equivalent to personal service—Recovery of judgment against natural justice—Appeal by co-defendant—Effect of.]—Held, in an action on a judgment recovered in the Province of Quebec, that an appearance entered by an attorney for defendant to the action in which the judgment was recovered, must be deemed either as an admission of or a dispensation with personal service, so as to preclude the merits of the original cause of action being entered into.

Where, after the entry of such appearance, the plaintiff accepts from defendant a mortgage in satisfaction and discharge of his claim, &c., and

then without any notice to or knowledge by defendant proceeds with an action and recovers judgment.

Quære, whether, although precluded from entering into the merits, evidence of such circumstances may not be given, as shewing that the judgment so recovered is contrary to natural justice and a fraud on defendant; and a new trial was granted to afford the defendant the opportunity of thus questioning the recovery.

Where, also, a co-defendant in the original action in said Province had appealed therein from said judgment, which appeal was still pending.

Quære, whether during the pendency of such appeal, an action can be maintained on said judgment against a defendant who has not appealed. The evidence on this point being conflicting the new trial was also granted thereon, to enable further evidence to be adduced.—*Turcotte v. Dawson*, 23.

FRAUD.

Bond—False representation as to contents—Omission to read over—Evidence—Negligence.]—To an action on a bond against the defendants, as the sureties of one F. for his liability to the plaintiffs on a running account, the bond being a continuing security until countermanded by defendants by notice in writing, the defendants, who, by their own shewing, had never taken the trouble to read over the bond although they had every opportunity of so doing, set up that they were induced to execute it by the false and fraudulent representation of the plaintiffs' agent that it was merely a renewal for another year of a previous bond for that period, for the same purpose,

to which the defendants were also parties. The agent denied any such representation, and it appeared that he could have had no object in obtaining the bond, as defendants were already liable on the previous bond, which the plaintiffs could immediately have enforced:

Held, under these circumstances, and on the evidence, more fully set out in the case, that there was no sufficient evidence of any such false representation; and that the plaintiffs were entitled to recover.

Semblé, that defendants, by their own negligence, had precluded themselves from such defence. — *Dominion Bank v. Blair et al*, 591.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2—DEFAMATION, 1—INSOLVENCY, 4.

FREIGHT.

See INSURANCE, 7.

GOODS.

See SALE OF GOODS.

GUARANTEE.

Continuing.]—See BILLS OF LADING.

Action on guarantee policy.]—See INSURANCE, 3, 6.

Stock.]—See INSURANCE, 6.

See FRAUD — PRINCIPAL AND SURETY.

HABENDUM.

See CROWN PATENT—DEED, 2.

HIGHWAYS.

See WAYS.

HIRING.

See MASTER AND SERVANT.

HUSBAND AND WIFE.

Breach of promise of marriage—Excessive damages—New trial.]—In an action for breach of promise of marriage the jury gave \$4,500 damages; and the case having been fully and fairly brought before them, and there being evidence to justify their verdict, the Court, though considering the amount unusually large, refused to interfere.—*Woodman v. Blair*, 452.

Land conveyed by husband to wife—Wife's estate in.]—See JUSTICE OF THE PEACE, 1.

Notice to husband whether notice to wife.]—See LIMITATIONS, STATUTE OF, 2.

Action by—Smallness of damages.]—See NEW TRIAL.

ILLEGALITY.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2—CONTRACT.

IMMORAL CONSIDERATION.

See CONTRACT.

IMPROVEMENTS.

Lien for.]—See CONTRACT.

INCEST.

Charge of.]—See DEFAMATION, 2.

INCUMBRANCES.

See INSURANCE, 2, 4.

INFORMATION.

Proof of.]—See MALICIOUS ARREST.

INSOLVENCY.

1. *Sale of goods within thirty days of insolvency—Statutory presumption of being made in contemplation of insolvency—Section 133 of Act of 1875—Whether accommodation acceptor a creditor.]*—Where a sale or transfer of goods is made to a creditor within thirty days before the issuing of a writ of attachment in insolvency: *Held*, the statutory presumption raised by section 133 of the Act of 1875, that it is done in contemplation of insolvency, is not displaced by merely shewing that the sale or transfer was *bona fide*, or that the creditor did not know or had not probable cause for believing the insolvent was unable to meet his engagements.

In this case the goods were delivered to the defendant, an accommodation acceptor of a draft drawn on him by insolvents, and protested for non-payment, upon the defendant agreeing to take up the draft, which he did. The only evidence as to the condition of the insolvents' affairs was, that within three days after the delivery of the goods, the insolvents made an assignment in pursuance of the Act, their liabilities being upwards of \$147,000.

Held, under these circumstances the sale must be deemed to have been made in contemplation of insolvency, and there being no evidence displacing such presumption, the defendant, if a creditor, must be assumed to have obtained an unjust preference, notwithstanding the jury expressly found otherwise.

Held, however, that an accommodation acceptor who has not paid the note is not a creditor within the meaning of the 133rd section of the Act, so as to avoid a sale made in good faith and in the ordinary course of business.—*Evans v. Ross*, 121.

2. Dissolution of partnership—Proof of claim of retiring partner—Equitable debt.]—Upon the dissolution of a partnership between W. & McC., it was agreed that all the partnership property and assets should be vested in W., who was to collect all the debts and pay the liabilities of the firm, and that an account was to be taken of the copartnership business to ascertain the respective shares or interest of the partners therein, or the amount payable by either to the other, W. to be charged with the value of the assets and to be credited with the liabilities, and all that remained to be done was to ascertain by taking an account of the indebtedness existing between them. McC. then carried on business on his own behalf, and becoming insolvent, made an assignment to the plaintiff as assignee in insolvency. It was claimed that upon taking accounts between McC. and W., a balance would be found due to W., for which he was entitled to rank upon McC.'s estate.

Held, that W.'s claim was an equitable debt, capable of being ascertained by the Court, and for

which therefore he was entitled to so rank on McC.'s estate.—*Hall v. Lannin*, 204.

3. Joint stock company.]—*Held*, the directors of a joint stock company incorporated under the "Canada Joint Stock Companies Letters Patent Act, 1869, 32-33 Vic. ch. 13, D.", and subject to the provisions of the Insolvent Act of 1875, cannot, without being authorized by the shareholders, make a voluntary assignment in insolvency.—*Donley, Assignee, v. Holmwood*, 240.

4. Proof by surety without payment of debt—Deed of composition and discharge—Proof of claim—Valuing security—Fraud.]—The plaintiffs were creditors of the defendants, insolvents, for \$10,800, and not having proved T., who was security for plaintiffs, without having paid the debt, proved therefor, fearing, as he alleged, that, if compelled to pay, he would have no recourse against the estate. One R., a surety for other creditors, in like manner proved. The proof of these claims was not contested, and a deed of composition and discharge was entered into, which was executed by T. and R., it being admitted that without computing one or the other of these claims there were not creditors to three-fourths in value executing; and on the production to the Judge of the assignee's certificate of there being the proper number and value of creditors executing, the deed was confirmed. The composition was to be paid by instalments, for which the insolvents were to give their promissory notes, and it was provided in accordance with a stipulation to that effect by the creditors, that the three last payments to the creditors,

except T., were to be secured by the assignment of the dividends on the notes to be given to T., and such notes were accordingly assigned by him as such security, and the proceeds thereof applied in meeting a deficiency in such payments. After the deed had been confirmed and the estate handed back to the insolvents, the plaintiffs sent in proof of their claim, valuing their security, which the assignee refused to accept, because the estate had passed out of his hands, and he referred plaintiffs to the insolvents, but nothing further was done. The plaintiffs sued defendants on the common counts for the whole debt, and on a special count for the amount of the composition, alleging neglect in the defendants to give them the composition notes, or pay their debt.

Held, that the plaintiffs could not recover under the common counts, for that the deed of composition and discharge constituted a good defence thereto ; and the special replications thereto, set out in the case, were not proved ; for that even if plaintiffs' debt were excluded therefrom there would still be the three-fourths in value of creditors executing ; that defendants did not, as was alleged, procure T. to prove so as to defeat the plaintiffs, for that he did it of his own accord for the reason above stated, nor did the giving the notes to T. diminish the proportion each creditor was entitled to, nor had the assignment of the notes as such security the effect of postponing the time of payment of the notes.

Per WILSON, C. J., the fact of the parties, with the knowledge that the surety had not paid the debt, suffering him to rank as a creditor, and the creditors stipulating as the con-

dition of their assent to the composition that the notes to be given to T. should be assigned as such security, &c., and the assignee with knowledge of these facts untruly certifying to the County Judge, constituted such fraud as would nullify and avoid the deed as against the plaintiffs, and, if necessary, leave should be granted to plaintiffs to so amend their replication as to set up these facts ; and also, if by these transactions defendants were unable or less able to pay plaintiffs' composition, the creditors, and all parties to the fraud, should be called upon to make it up.

Per OSLER, J., on a proper construction of the evidence, no such fraud was established.

Held, however, that the plaintiffs' were entitled to recover the amount of the composition, after deducting the value of their security : that no demand of the notes was necessary, it being defendants' duty to give them ; nor, in case of composition, for plaintiffs to have proved their claim ; that what was done by plaintiffs amounted to a specification and valuation of their security, but, if not, defendants under the circumstances should not be permitted to set this up as a defence.—*Lewis et al v. Tudhope et al*, 279.

5. *Order for payment of money—Act of 1875, sec. 133.]*—G. & C., a manufacturing firm, being indebted to plaintiff on a note, gave him, at his request, as security therefor, a chattel mortgage for \$1,500 and interest on certain tools and machinery in their manufactory, containing a covenant to insure and on demand to assign the policy to the plaintiff ; but no insurance was effected, and shortly afterwards the property was burned. The mortgagors, however,

held an insurance on the chattels in the S. company, which appeared to be invalid, and also one in the W. company, not on the chattels, but on the building in which they were. Some days after the fire G. & C., with the knowledge that they were insolvent, and within thirty days of being declared insolvent, gave the plaintiff an order on W. company for \$675.

Held, that the order was void under the 133rd section of the Insolvent Act of 1875.—*Smyth v. Morton, Assignee*, 566.

INSPECTION.

Of goods.]—See SALE OF GOODS.

INSURANCE.

1. *Pleading—Departure—Statutory conditions.]*—The second count of a declaration, after alleging that it was on a fire insurance policy for \$1,000, dated 28th May, 1877, which by its terms was said to be subject to certain pretended conditions endorsed thereon, and set out at length in the first count, averred that the policy was one entered into, and in force in Ontario, with respect to property situate therein, and that the said conditions were the only conditions stated in said policy, and were not, nor were any of them, conditions mentioned in, or in conformity with, the Fire Insurance Policy Act, nor variations thereof, as required by said Act, whereby the conditions so endorsed upon the policy were inoperative and void, and the policy was free from all conditions as against the plaintiff.

The fifth and sixth pleas alleged that the policy was subject to the conditions in the words and figures following: Setting out conditions, in the exact terms of statutory condition No. 13, with respect to proofs of loss, and averred non-performance by omitting respectively to give notice of loss forthwith, and to deliver a statutory declaration that the loss was just and true, &c. To these pleas plaintiff replied respectively, setting up grounds of excuse for the non-performance of the said conditions.

Held, by OSLER, J., replications bad, as being a departure from the declaration; but the pleas were also bad, for that they must be read as alleging that the policy was subject to the conditions set out in the pleas, being the statutory conditions, without shewing that they were endorsed upon the policy, or were of the character referred to in *Geraldi v. Provincial Ins. Co.*, 29 C. P. 321.—*Brillinger v. Isolated Risk and Farmers' Ins. Co.*, 9.

2. *Fire insurance—Condition forfeiting policy for seizure of goods under execution or for dispute as to title—Whether just and reasonable—Seizure.*—A special condition of a policy of insurance effected by one K. on certain goods, provided that if the insured property should be levied upon or taken into possession or custody under any legal process, or the title be disputed in any proceeding in law or equity, the policy should cease to be binding on the insured. The goods, prior to the insurance being effected and up to the time of the loss, were mortgaged by K. to the plaintiff, to whom the loss was made payable. After the making of the policy, an execution at the suit

of one D. against K. issued against his goods, under which the goods, which were in K.'s possession, were seized, but on a bond being given for re-delivery of the goods upon request to the sheriff, the seizure was withdrawn, and the goods were left in K.'s possession.

Held, that there was a valid seizure, for the goods being in K.'s possession, the sheriff, so long as he was not forbidden doing so by the mortgagee, might properly seize them in *corpore*, and if need be, take them out of K.'s possession, and that what occurred subsequently could make no difference.

Held, also, that that part of the condition which referred to the levy or taking possession of the goods under legal process, was, on the particular facts of this case, just and reasonable for although the condition in its generality might be unjust and unreasonable as applying to all seizures, legal or otherwise, yet that it was divisible so as to be just and reasonable when applicable, as here, to a legal seizure. The policy was therefore held to be avoided.

Per WILSON, C.J.—The other part of the condition referring to the title being disputed, &c., was not just and reasonable.—*May v. Standard Fire Ins. Co.*, 51.

This case has been reversed on Appeal.

3. *Action on guarantee policy—Default of town treasurer—Amount of default—Appropriation of payments—County auditors—Audit—R. S. O. ch. 204, sec. 87, sub-sec. 7, ch. 205, sec. 3—Authority for paying out money.]—Action on a guarantee policy for loss sustained by plaintiffs through the default of one D., their secretary-treasurer.*

The plaintiffs made, on 1st Janu-

ary 1879, their claim under the policy, which only extended to losses occurring within the period of twelve months prior to such claim being made. It appeared that at the end of 1877, the default was \$674, which was increased during the first two months of 1878 to \$1,261.57, but in the next four months the deficiency was reduced by payments to \$292.85, after which it again increased until, at the end of 1878, it amounted to \$844.22.

Held, in accordance with the general rule as to appropriation of payments, that in the absence of any specific appropriation, the payments must be appropriated to the earliest items of the default, thereby paying off the whole of the default due at the end of 1877, so that the whole \$844.22, due at the end of 1878, must be deemed to have accrued due within that year; and the plaintiff was entitled, if at all, to recover this amount.

The guarantee proposal herein contained certain statements which were made to form part of the contract, and one of which was that D.'s books would be balanced and closed at the end of each year, and that the cash and securities at plaintiffs' credit at each balancing time would be examined and verified by the auditors as required by the statute.

Held, under R. S. O. ch. 204, sec. 87, sub-sec. 7, and R. S. O. ch. 205, sec. 3, Paris, not being an incorporated town withdrawn from the county, the audit should have been made by the county auditors, and not, as here, by the town auditors; and also that the evidence, set out in the case, shewed that there was no audit in fact; and that therefore the terms of the guarantee had not been complied with.

Another statement contained in the guarantee proposal was that all moneys would be drawn out from the bank where they were deposited only by authority of the Board of Education. The course pursued was for the chairman and D., the secretary, to sign orders addressed to D., as such secretary, directing him to pay bearer so much money, and specifying the service for which it was payable. D. then drew his own cheques for the amounts without their being countersigned by any of the Board, and without attaching the order thereto, consequently there was nothing to prevent D. drawing, as he did, moneys for his own purposes.

Held, that the terms of the guarantee in this respect also had not been complied with.

Held, therefore, that the plaintiffs, under these circumstances, could not recover.—*Board of Education of Paris v. Citizens' Insurance and Investment Co.*, 132.

4. *Title—Ownership—Incumbrances—Distance of contiguous buildings—Diagram—Number of stoves—Statutory conditions—Just and reasonable conditions—Warranty.*]—To an action on a policy of insurance against fire, the sixth plea set up a condition of the policy, that the statements contained in the application were to be taken and deemed to be warranted by the insured, and alleged that the plaintiff stated he owned the land in fee simple in his own right, on which the insured premises were, whereas he did not. It appeared that he had a deed in fee simple, but had not paid the price. *Held*, that this was no untrue representation.

Another plea set up that the in-

sured stated in the application that there was only one stove on the insured premises, whereas there were two.

Held, that this was an untrue statement which avoided the policy.

The eighth plea set up a condition of the policy, that if the insured's interest in the property was other than the entire unconditional and sole ownership thereof for his own use and benefit, it must be so represented in the application, otherwise the policy would be void, and alleged that the insured had failed to declare therein that other persons were jointly interested in the property, whereby the policy was void. By the application the insured agreed to be bound by the conditions of the policy issued in accordance therewith, but in the application he was not asked to state the above facts.

Held, that to permit this defence to be set up would be a fraud on the insured, and he was allowed to reply such fraud, unless the defendants consented to the plea being struck out from the record.

The eleventh plea set up another condition of the policy, that if the insured's interest in the property should be changed in any manner, whether by act of the parties or by operation of law, the policy should be void, and alleged that after the issuing of the policy the insured mortgaged the property, whereby his interest became changed and the policy avoided.

Held, this plea, which was proved, constituted a good defence, and avoided the policy.

The application herein contained the following memorandum: "Annex diagram shewing size and distance of all buildings within 500 feet" of the insured premises; and the applica-

tion concluded : "I hereby make application for insurance as above specified, and I declare that the answers to the above questions and the description in the annexed diagram are true and complete in all particulars." The back of the application was headed "Diagram," with directions as to filling it up. In the policy it was stated that the application and survey is hereby referred to as forming part of the policy. There were two buildings, one 18 x 20, and another smaller one, within the 500 feet, omitted from the diagram.

Semble, that the diagram was a part of the application within the meaning of the condition making the statements in the application warranties ; and that the omission of the two buildings, at all events the larger one, would avoid the policy ; but that the statement in the diagram of a building being 190 feet instead of 178 feet was so slight a difference as to be immaterial, and the jury having found in plaintiff's favour thereon, the Court would not interfere.

The policy was issued on the 2nd May, 1876, being before the coming into force of the Fire Policy Act of 1876. *Held*, that the policy did not come within the Act so as to make the statutory conditions applicable ; and even if the Lieutenant-Governor's proclamation provided for by the Act of 1875, was issued before 1876, but of this there was no evidence, the Court under such Act would only be enabled to say what conditions were just and reasonable.

Semble, per WILSON, C. J., that the conditions set out in the sixth and eleventh pleas were just and reasonable, but not that set out in the eighth plea.—*O'Neil v. Ottawa Agricultural Ins. Co.*, 151.

5. *Action on policy—Reference by consent—Right of appeal—Subsequent insurance—Cancellation of insurance—Evidence.]*—In an action on a fire insurance policy, the learned Judge at the trial, by the consent of the parties, directed a reference, which did not contain any agreement allowing an appeal on the merits.

Held, that an appeal would not lie.

Semble, that the evidence, set out in the case, sustained the finding of the arbitrator herein, that at the time of the loss the insurance in defendant's company had been cancelled, and a new and valid insurance effected in another company.—*Walker v. Beaver and Toronto Mutual Fire Ins. Co.*, 211.

6. *Mutual insurance—Unauthorized branches—Re-insurance—Guarantee stock—Debentures.]*—In actions by plaintiffs, a mutual insurance company incorporated by special Act, 32 & 33 Vic. ch. 70, D., against defendants on their policies for the losses and liabilities on the winding up of the company under 40 Vic. ch. 72, D.

Held, that defendants were not liable, as their insurances were effected in branches not authorized by the Acts affecting the company, and were therefore invalid.

Held, also, that even if the insurances were valid, the liability would only be for the losses and liabilities in the particular branch in which the insurances were effected, and not for the general losses and liabilities of the company, and that sec. 4 of the Winding-up Act in no way extended their liability : that, in such event, a claim for re-insurance was sustainable, although the company had not paid the amount, but only

to the extent of the re-insurance of each particular policy, and that no such claim could arise where the policies were cancelled for non-payment of the assessments, neither could there be any such claim against an insured where he had become insolvent, and the policy was assigned to the assignee with the consent of the company ; that a claim for guarantee stock was sustainable, notwithstanding the by-law creating it was objectionable in pledging the whole instead of two-thirds of the premium notes as security for the payment thereof, and in other respects, as stated in the case : that a liability for debentures issued by the company could also be supported, but only the members liable for the losses and liabilities for payment of which the debentures were issued would be liable for the debentures themselves ; and that the fact of the issue of debentures being in excess of the amount authorized by the statutes, namely, one-fourth part of the premium notes, did not render the whole issue invalid, but only the amount so issued in excess.—*Beaver and Toronto Mutual Fire Ins. Co. v. Spires*, 304.

7. *Guarantee policy—Representation as to prior default.]*—To an action on a guarantee policy for the due performance of B.'s duties as plaintiffs' secretary, alleging default in paying over moneys, the defendants pleaded that the plaintiffs, in order to induce defendants to enter into the contract, represented and warranted to defendants certain facts material to be known to them, as follows : that the said B. had never been in arrear or default in his accounts ; yet the said B. had prior thereto been in arrear and default in his accounts while in the employment of one R. B.

Held, by OSLER, J., plea good ; for that the representation was not necessarily restricted to a default made while in plaintiffs' service, and what it really extended to might be shewn at the trial.—*Ottawa Agricultural Ins. Co. v. Canada Guarantee Co.*, 360.

8. *Insurance on freight—Termination of voyage by accident—Total loss of freight, claim for—Evidence.]*—The owner of a vessel had insured it, as also the freight, with the defendants on a voyage from Toledo, U. S., to Kingston, Ont., and the owner of the cargo had insured it with the plaintiffs. During the voyage the vessel sank in the Welland canal, near Port Colborne, and the cargo (15,000 bushels of corn,) being damaged, was abandoned by the owner to the plaintiffs. The plaintiffs, desiring to send it to Buffalo, instead of to Kingston, applied to the owner of the vessel for possession thereof, offering to pay one half of the freight *pro rata itineris*. To this the defendants objected unless the owner would exonerate them from any liability under their policy, and an arrangement was then made between the owner of the vessel and the plaintiffs, whereby, on the plaintiffs paying full freight, the owner assigned to them the defendants' policy on the freight and gave them possession of the cargo, which was then taken by the plaintiffs to Buffalo, and sold there.

Held, WILSON, C. J., dissenting, that the plaintiff could not recover against defendants on the policy as for total loss of freight : that the evidence shewed that the cargo was not forwarded to Kingston, not because another vessel could not have been obtained or this vessel repaired,

and it would not have arrived there in specie if reshipped within a reasonable time, but because the insurers of the cargo thought it more to their interest, though against the protest of the defendants, to determine the voyage.

Per WILSON, C. J., that the plaintiffs were entitled to recover: that the evidence shewed that the voyage was given up voluntarily by all parties, including the defendants, and the payment of the freight was not in exoneration of the defendants, but was a compulsory payment by the plaintiffs to get possession of their property.—*Anchor Ins. Co. v. Phoenix Ins. Co.*, 570.

This case has been carried to Appeal.

See PRINCIPAL AND SURETY, 1.

JUDGES.

Appointment of.] 1.

JUDGMENT.

Foreign.]—See FOREIGN LAW.

See PRINCIPAL AND SURETY, 2.

JURISDICTION.

See BRIDGE.

JUSTICE OF THE PEACE.

1. *Qui tam action—Property qualification under R. S. O. ch. 71, sec. 7—Reception of improper evidence—Form of Rule nisi—Misdirection—Equitable estate—Wife's estate—Tenancy in common.]*—In a rule *nisi* for a new trial for the admission of im-

proper evidence, it is not sufficient to state merely that improper evidence has been admitted, but the evidence objected to should be specified, and the objection should be taken at the trial.

In a *qui tam* action against defendant for acting as Justice of the Peace without the necessary property qualification required by R.S.O. ch. 71, sec. 7, the defendant was called as a witness on his own behalf, and gave evidence as to the value of the property on which he qualified, and the learned Judge in charging the jury told them that, generally speaking, the owner of property had the best opinion of its value.

Held, there was no misdirection; for that the jury were not told that they were to be guided by such opinion, or that it was most likely to be correct.

In a penal action, where the jury find for the defendant, a new trial will not be granted merely because the verdict may be deemed to be against the evidence or weight of evidence; but it is otherwise where the verdict is in contravention of the law, arising either from the misdirection of the Judge, or from a misapprehension of the law by the jury, or from a desire on their part to take the law in their own hands.

Where, therefore, in such *qui tam* action, which is looked upon as a penal action, the jury, though greatly overvaluing the property, found for the defendant, but none of the above considerations arose, a new trial was refused.

Semblé, that the ownership of an equitable estate in land is sufficient to enable the owner to qualify thereon under the statute.

Where, however, a husband caused certain land to be conveyed to

his wife by deed, absolute as between them, and without any declaration of trust in his favour; *Held*, that though the conveyance might be void as against his creditors, yet that the husband could not qualify on the land, for, so far as he was concerned, the absolute property therein was, by his own act, vested in his wife.

It was urged in term that the jury in their finding had treated the defendant as the sole owner of certain part of the property, whereas it was owned by himself and son as tenants in common, and that his moiety was not of sufficient value. At the trial the deed to the father and son was simply produced without the point as to the tenancy in common being taken, and it was proved that the son had afterwards joined with the father in a mortgage of the land.

Held, that the objection could not be entertained, for if taken at the trial, such an explanation might have been given as would have shewn there was no foundation for it; but, even if such ownership did exist, the question of value being for the jury, it could not be assumed that in estimating such value they had disregarded the point.—*Crandell qui tam v. Nott*, 63.

2. *Conviction made in county—Justices signing in city—Validity of—Evidence—Admissibility of—R. S. O. ch. 5, sec. 3, ch. 72, sec. 6.]*—By R. S. O. ch. 5, sec. 3, certain cities, including Kingston, form, for judicial purposes, part of the respective counties in which they are situate, and by ch. 72, sec. 6, no other Justice of the Peace shall act in any case for any city having a Police Magistrate.

The conviction, in this case was signed by two Justices of the county of Frontenac. The case was heard

in the county, and the conviction stated that it was signed there, but it appeared that one of the Justices signed it in the city.

In replevin for plaintiff's goods sold under a distress warrant issued upon such conviction, *Held*, that the plaintiff could not recover, 1, for the Justices had not acted *for the city* within ch. 72; and 2, the conviction, which could not be questioned in this action, stated it was signed within the county.

Quære, whether the signing of the conviction was a judicial or ministerial act, and therefore whether the place where it was done was material.—*Langwith v. Dawson et al.*, 375.

3. *Justices of the Peace—R. S. O. ch. 76, sec. 1.]*—The effect of R. S. O. ch. 76, sec. 1, is to require justices of the peace, where more than one take part in a conviction, to make an immediate return thereof to the Clerk of the Peace.

Where, therefore, to a declaration alleging a conviction by the defendants, two justices of the peace, and their failure to make an immediate return thereof as required, the defendants pleaded that before action they duly made the return of the said conviction required by law to be made by them; *Held*, that the plea was bad, for that the return therein set up was not a compliance with the statute.—*Atwood qui tam v. Rosser et al.*, 628.

See POLICE MAGISTRATE.

LANDS.

Agreement to convey.]—See CONTRACT.

Compensation for lands taken.]—See RAILWAYS, 1, 3—WAYS, 1.

See CROWN PATENT.

LIBEL.*See DEFAMATION.***LICENSE.***See DEED, 2.***LIEN.***For improvements.]—See CONTRACT.***LIMITATION OF ACTION.***See LIMITATIONS, STATUTE OF, 1.***LIMITATIONS, STATUTE OF.**

1. *Statute of Limitations—Ejectment as a bar—Leave in term to supply evidence.]*—In ejectment by plaintiffs claiming a possessory title as heirs-at-law of one W., it appeared that in 1873, before the statutory period had elapsed, the owner had brought ejectment against W., and that, on proof of an agreement by W., in 1861, to give up possession on demand, and under pressure thereof, a compromise was effected after the record had been entered for trial in 1876, by the owner paying a small sum of money and W. giving up possession, a written memorandum of such compromise being drawn up at the time.

Held, that the plaintiffs could not recover: that the commencement of the action of ejectment prevented the operation of the statute; and that it was immaterial therefore that the plaintiff in it had not entered until 1876, after the ten years required to give a title had expired; and had not entered judgment or taken possession under a *hab. fac. poss.*

On the argument herein in term,

the Court, on the application of the defendants' counsel, under R. S. O. ch. 49, sec. 8a (41 Vic. ch. 8, sec. 7), granted leave to the defendants to supply evidence of a search for the memorandum of the compromise, and also to put in the original writ of ejectment in the former action, and the affidavit of service thereof, a copy of such writ only having been filed at the trial; but as without this the defendants would have failed, the plaintiffs were allowed the costs in term.—*Young et al. v. Hobson et al.*, 431.

2. *Statute of Limitations—Wild land—Notice to husband whether notice to wife—4 Wm. IV. ch 1, secs. 17, 24, 27, & 28 Vic. ch. 29, sec. 3, construction of.]*—In 1823, adverse possession was taken of land by trespassers while in a state of nature, without any notice or knowledge thereof to the owners, several tenants in common claiming under the grantees of the Crown. In 1842 the husband of one of such tenants seized in right of his wife, usurping the rights of the other tenants, made leases of the whole land to the trespassers.

Held, that the knowledge acquired by the husband when he gave the leases, of the possession of the trespassers, was the knowledge of his wife, under 4 Wm. IV. ch. 1, sec. 17, so as to prevent her or those claiming under her from setting up the protection afforded by that statute to the owner of the lands so taken possession of; and therefore on the determination of the leases in 1853, when the right of entry accrued, the Statute of Limitations commenced to run against her, and the title of the plaintiff claiming under her was barred by a twenty years' subsequent possession.

Held, also, that under section 24, the leases so made by the husband were made in his separate right to the exclusion of the other co-tenants, and not for their benefit.

Held, also, that the Act of 1864, 27 & 28 Vic. ch. 29, sec. 3, making forty years an absolute bar, even as against grantees of wild lands taken possession of while in a state of nature without their knowledge, applies to cases arising before as well as after the passing of the Act.—

Harris v. Prentiss et al., 484.

See MALICIOUS ARREST—PRINCIPAL AND SURETY, 2.

MAGISTRATES.

See JUSTICES OF THE PEACE—POLICE MAGISTRATE.

MALICIOUS ARREST.

Proof of warrant and information—Date of acquittal—Statute of Limitations—Evidence—Excessive damages—Costs.]—The first count of a declaration alleged that one K. falsely and maliciously, and without reasonable or probable cause, issued a warrant against plaintiff on a charge of fraud, &c., and that defendant falsely and maliciously, and without reasonable or probable cause, prosecuted the same, and caused the plaintiff to be arrested and imprisoned, alleging the trial and the acquittal of plaintiff and the termination of the proceedings. The second count alleged that defendant falsely and maliciously, &c., indicted the plaintiff on said charge, and caused him to be tried thereon, alleging as before his acquittal, &c.

Held, that under the first count the warrant under which plaintiff

was arrested should have been produced, or evidence of a search and its loss, to enable secondary evidence of its contents to be given; but as such secondary evidence was given at the trial without objection, an objection taken for the first time in the rule *nisi* was too late.

A similar objection taken in the rule *nisi* as to proof of the information, even if such proof were necessary, was for the same reason *held* to be too late.

Held, that under the second count proof of such documents was not necessary.

Held, also, that the plaintiff was not bound by the day of acquittal as stated in the record thereof, being the commission day of the Assizes, but might shew the actual day on which it took place.

Held, also, that the Statute of Limitations commenced to run from the date of acquittal, when the proceedings became terminated, before which the plaintiff had no right of action, and not from the date of arrest.

Held, also, that the evidence set out in the case, was sufficient to connect defendant with the arrest and prosecution of the plaintiff, and to shew that he acted without reasonable and probable cause.

The Court was of opinion that the damages given, \$3000, were excessive, and directed, subject to the plaintiff's acceptance, that they be reduced to \$1,000 absolutely, and to \$500 if such sum and the costs of the action were paid before 1st of June; but in the event of the plaintiff refusing to accept the proposed terms, then there should be a new trial on payment of costs by the defendant.—*Crandall v. Crandall*, 497.

MARINE INSURANCE.

See INSURANCE.

MARRIAGE.

Breach of promise.]—See HUSBAND AND WIFE.

MASTER.

Of vessel.]—See MASTER AND SERVANT.

MASTER AND SERVANT.

Liability for neglect of fellow servant—Duty to hire competent servants—Shipping—Master of vessel.]—Held, that a master may, among other duties, delegate to another the duty of selecting fellow workmen or servants, and that in such a case the master's obligation is limited to the exercise of reasonable care in selecting a competent person for such purpose.

In an action against defendants, the owners of a vessel, for employing incompetent sailors, whereby an accident happened to the plaintiff, it appeared that the duty of hiring the sailors had been delegated by the owners to the captain, a competent person for such purpose, and that he had hired the men in question.

Held, that the defendants were not liable.—Wilson v. Hume et al., 542.

MEMORANDA.

1, 193, 349, 465, 626.

MISDIRECTION.

See BRIDGE—JUSTICE OF THE PEACE, 1.

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MONEY HAD AND RECEIVED.

See BILLS OF LADING.

MORTGAGE.

See ARBITRATION, 1—REGISTRY LAWS—CHATTTEL MORTGAGE—PRINCIPAL AND AGENT.

MUNICIPAL CORPORATIONS.

See INSURANCE, 3—JUSTICE OF THE PEACE, 2—POLICE MAGISTRATE—WAYS.

MUTUAL INSURANCE.

See INSURANCE.

NATURAL JUSTICE.

See FOREIGN LAW.

NEGLIGENCE.

See BRIDGE—FRAUD—MASTER AND SERVANT—NEW TRIAL—RAILWAYS, 2—WAYS 2, 3.

NEW TRIAL.

Action by husband and wife—Accident—Negligence—New trial—Smallness of damages.]—Action by husband and wife for damages sustained by them by the upsetting of a

buggy in which they were driving, by reason of its coming in contact with a large stone negligently left by the defendants on the highway. In the first two counts the wife claimed damages for personal injuries sustained by her, and in the last two the husband claimed for the loss of his wife's society and services, and for expenses incurred in medical attendance; also for damage to personal property. It was proved that the wife was very seriously injured, and that the husband had incurred expenses for medical attendance, and that his buggy was damaged to the extent of \$30. The jury found as follows: "Verdict for the plaintiffs on the first and second counts, and \$130 damages. No damages on the last two counts.

Held, that although a new trial would not be granted for smallness of damages on the first two counts, yet as there must be a new trial on the last two counts and, as no additional expense would be incurred thereby, justice would be done by granting a new trial on the whole record, without costs.—*Anderson et al. v. Matthews et al.*, 166.

See APPROPRIATION OF PAYMENTS—BILLS OF EXCHANGE AND PROMISSORY NOTES, 1—DEFAMATION, 1—FOREIGN LAW—JUSTICE OF THE PEACE, 1—HUSBAND AND WIFE—MALICIOUS ARREST.

NOTICE.

See BANKS, 1—LIMITATIONS, STATUTE OF, 2—WAYS, 1, 3—WORK AND LABOUR.

NOTICE OF DISHONOUR.

See BANKS, 2.—BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.

OWNERSHIP.

See INSURANCE, 2, 4.

PARLIAMENT.

Election—Application for new petitioner after lapse of six months—Corrupt bargain—Meaning of.]—The applicant herein, alleging that there was a corrupt agreement for the withdrawal of the petitions in the above cases, by which the petitions were to be allowed to lapse, each petitioner withdrawing the charges by him respectively preferred, applied to have himself substituted as petitioner in each case, and that the deposits made therein should remain as security for any costs that might be incurred by him; and for the appointment of a day of trial of such petitions.

Held, that under sec. 2 of the Act of 1875, the trial of election petitions must take place within the six months limited by that Act, unless postponed as therein directed: and it appearing that the time so limited had expired prior to the application, it could not therefore be entertained.

Held, also, that, in any event the deposits would not be directed to remain as such security, for although the said agreement might be deemed in law to constitute a "corrupt bargain," yet that it would not be so under the statute 37 Vic. ch. 10, secs. 5, D., for that thereunder the motives and intent of the parties must be considered, and the evidence, set out in the case, shewed that no corrupt bargain was intended.—*Re Kingston Election Case*, 389.

PAROL EVIDENCE.

See SALE OF GOODS.

PAROL SUBMISSION.

See ARBITRATION, 2.

PARTNERSHIP.

Cheque or order on firm—Acceptance by partner not in firm's name—Bona fides—Liability.]—The three defendants carried on business in partnership as stock brokers and financial agents, under the name of Cassels Son & Co. By the articles of partnership it was required that all bills, drafts, cheques, &c., should be signed in the name of the firm. It appeared that one of the defendants and one L. were engaged in private transactions not connected with or known to the firm, and in the course thereof L. who had no available funds in the firm's hands, drew a cheque or order on them in favour of the plaintiff for \$600, and C. marked across it "Good, A. B. C." L. then procured plaintiff to discount it at the rate of 30 per cent per annum, and to hold it for a month.

Held, that the firm were not liable on such order, for the acceptance was not in the name of the firm, and the evidence shewed the cheque or order was not taken by plaintiff in good faith.—Hovey v. Cassels et al., 230.

Individual liability.]—*See APPROPRIATION OF PAYMENTS.*

Dissolution of—Proof of claim of retiring partner—Equitable debt.]—*See INSOLVENCY, 2.*

See PRINCIPAL AND AGENT.

PATENT.

See CROWN PATENT.

PAYMENT.

Of deposit receipt after death of depositor without notice—Revocation of authority.]—*See BANKS, 1.*

Alteration of place of—Effect of.]—*See BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.*

Plea of, into Court.]—*See RAILWAYS, 1.*

See APPROPRIATION OF PAYMENTS—BANKS, 2—INSOLVENCY, 5—INSURANCE, 3.

PETITIONER.

Application for appointment of new.]—*See PARLIAMENT.*

PLEADING.

See BANKS, 1—INSURANCE, 1—JUSTICE OF THE PEACE, 3—PRINCIPAL AND SURETY, 1, 3—SHERIFF.

POLICE CLERK.

See POLICE MAGISTRATE.

POLICE MAGISTRATE.

Salary and fees—Police clerk—Appointment and fees of—R. S. O. ch. 174, sec. 412, construction of.]—The salary paid to a police magistrate of a city or town, under R. S. O. ch. 172, sec. 1, covers all cases that may come before him, arising within the city or town; so that he is not entitled to any fees except in what may be called purely county case e. g., where the charge

arises and the parties reside out of the city or town, or where it was a local matter, as for injury to property situate out of the town or city.

A town clerk, being also town treasurer, did not act as police clerk, and no appointment having been made by the municipal council, the police magistrate appointed a clerk from 1871 to 1877, which appointment the council, with full knowledge and notice thereof, never repudiated.

Held, that under these circumstances the clerk must be considered as if appointed by the council, and entitled to retain the fees given to police clerks by the statute.

Held, also, that the police magistrate was not entitled to charge these fees himself, and to pay the clerk a salary in lieu thereof.

A police clerk of a town remunerated by a fixed salary paid over to the municipality, in accordance with the statute, the fees received by him, amongst them being the fees for hearing and determining cases, and for records of convictions.

Held, that the police magistrate, for the reason and except as above stated, could not claim such last named fees.

Held, also, that the corporation of the town were not entitled to recover from the defendant any fees received by him.

Held, also, that sec. 412 of the Municipal Act, R. S. O. ch. 174, applies to cases arising both under the Dominion and Provincial Acts.—*Corporation of Peterborough v. Hatton*, 455.

POSSESSION.

See DEED, 2—*LIMITATIONS*, *STATUTE OF*—*WATER*.

PRACTICE.

See JUSTICES OF THE PEACE.

PRICE.

See SALE OF GOODS.

PRINCIPAL AND AGENT.

Proof of agency—Partnership—Co-ownership—Purely money demand—A. J. Act.]—The plaintiffs and several others, including one W., were tenants in common of certain oil lands, on which an oil well was sunk. In 1875, W. conveyed his interest to the defendant by way of mortgage for a loan, and defendant received from time to time from the plaintiffs, who, as they alleged, had at the request of the several co-owners acted as their agents, the amount of W.'s share of the proceeds of the sale of oil. The plaintiffs having incurred heavy liabilities in sinking new wells, and claiming that in so doing they had acted as the defendant's agents, brought an action against the defendant to recover her proportion thereof.

Held, that the evidence, set out in the case, failed to establish any such agency :

Held, also, that the defendant did not by reason of the mortgage to her and of the receipt of the proceeds of the oil, assume any liability which W. was under in respect to his co-owners; but even if she did, her position would be that of a partner, and she would be entitled, before an action would lie against her, to have the partnership accounts taken, and the balance ascertained or admitted to be due.

Held, also, that the plaintiff's claim was not a purely money demand, so as to be recoverable as such at law under the A. J. Act.—*Hope et al. v. Ferris*, 520.

See *SALE OF GOODS.*

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Semble, that the change in the mode of remuneration by commission instead of by fixed salary would release the surety, if the nature of the remuneration was communicated to him when he entered into the contract, for it was an alteration that might be prejudicial to him.

A rejoinder alleged that A. was induced to enter into the said bond for W. at a fixed salary, and believing such representations to be true, executed said bond, and the change in said plea set out was without his authority or consent.

Semble, rejoinder good: that it was not necessary to allege that said representation was made by the plaintiffs, for under the rejoinder the plaintiffs would have to prove that the representation was so made as to be binding on plaintiffs.—*Canada Agricultural Ins. Co. v. Watt et al.*, 350.

2. *Assignment of judgment debt—R. S. O. ch. 116, secs. 2, 3—Surety—Statute of Limitations.]*—*Held*, that an assignment of a judgment to a trustee for one of the defendants who had paid the debt, such defendant being surety for another defendant, was valid, notwithstanding it was made six years after such payment, and when the surety's direct cause of action against the principal debtor had been barred by the Statute of Limitations.—*Smith v. Burn et al.*, 630.

3. *Guarantee—Pleading.]*—Declaration alleged that the defendants by agreement under seal had agreed to become sureties for the performance of a contract made by one B. with the plaintiffs, whereby B. covenanted to purchase and provide all the lands required for, and to build

Replication, in substance that W.'s remuneration as such agent, whether by fixed salary or commission, formed no part of and was not contemplated in the contract of suretyship, nor was the change in any way prejudicial to the surety's interests, nor did it impose any greater liability upon him, and the said change did not include any change of W.'s duties and obligations as such agent.

Held, by CAMERON, J., replication bad, as being no answer to the plea, which alleged a discharge of W. from his engagement, and a re-engagement on different terms.

and maintain the plaintiffs' railway from Belleville to Lindsay, and to deliver it over completed by a day named, &c., and to indemnify the plaintiffs against all claims, &c., for lands taken and damage done thereto, and from all acts, omissions, and defaults which would give rise to claims against the plaintiffs, alleging as distinct breaches default by B. in the performance of each of the covenants so entered into by him, whereby &c.

Fifth plea: that plaintiffs mortgaged and otherwise incumbered the said road, and thereby released the sureties: *Held*, bad, as it did not appear how the incumbrances prejudiced the principal in the performance of the contract.

Sixth plea: that the plaintiffs altered the conditions of the contract by allotting to the principal a large quantity of stock in the company, and thereby released the defendants: *Held*, bad, in not shewing how the allotment altered the contract.

Ninth plea: that the plaintiffs sustained no loss or damage by B.'s default: *Held*, bad, for that the defendants' contract was not merely one of indemnity, but also for the performance by B. of certain specified acts, and non-performance of both was alleged.

Tenth plea: that after the breaches the plaintiffs, by by-law, rescinded the contract: *Held*, bad, as being no answer to the cause of action created by the breaches alleged.—*Grand Junction R. W. Co. v. Pope et al.*, 633.

See INSOLVENCY, 4—*INSURANCE*, 3, 7.

PRISONER.

Evidence of, in criminal cases.]—See CRIMINAL LAW, 1.

PRIVATE WAY.

See WAYS, 1.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PROPERTY.

Qualification under R. S. O. ch. 71, sec. 7]—See JUSTICE OF THE PEACE, 1.

PROTEST.

Notice of—Proof of sending.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.

PURELY MONEY DEMAND.

See PRINCIPAL AND AGENT.

QUALIFICATION.

Property.]—See JUSTICE OF THE PEACE, 1.

RAILWAYS.

1. *Railway Act of 1868—Freehold and leasehold lands taken—Bond to pay amount awarded—What covered by—Description of lands—Execution of award by two or three arbitrators—Validity of award—Tender of conveyance—Easement—Plead of payment into Court.]—Bond given by defendants to plaintiff, after reciting the service of a notice on plaintiff by the Kingston and Pembroke R. W.*

Co., requiring certain of his lands therein fully described for the railway purposes, and offering \$2,000 as compensation, which plaintiff had refused, was conditioned for the payment within one month after the making of an award under the Railway Act of 1868, of the sum to be found due him thereby, for damages sustained by him, and compensation due him, by reason of the railway company taking and retaining possession of his land, and for interest and costs lawfully payable to the plaintiff. The plaintiff's lands consisted of freehold and leasehold lands, the latter being held under leases from year to year, terminable by three months' notice, but if resumed before the expiration of 15 years from the commencement thereof which would be on the 1st of April, 1880, the lessee was to be paid for his improvements, but not otherwise. On the 29th of April, 1874, the lands comprised in the plaintiff's leases were leased to the railway company, subject to the existing leases, but with all the rights and powers, of the lessors thereunder. The plaintiff, by the award, was awarded \$708.64, with \$67.22 interest, for his freehold land taken, and an annual sum of \$349.70 for his leasehold land, from the date of the company's taking possession, 26th of June, 1877, until the termination of said leases. In an action on the bond, alleging as a breach the non-payment of the amount awarded with interest and costs:

Held, that the bond would cover the amount awarded for the freehold land; but not the annual sum awarded for the leasehold.

Held, also, that the amount awarded was less than the amount tendered; for assuming that the

company, as reversioners, would terminate the plaintiff's leases on the expiration of the 15 years, the annual value up to that event, namely, for two years, nine months, and four days, amounted to \$966.64, which with the \$708.64 for the freehold land, only amounted to \$1,675.18; and therefore plaintiff could not recover the costs of the arbitration.

In the award the plaintiff's freehold land was described as "the freehold portion of his lands taken."

Held, a sufficient description, as it could be identified by the notice served by the company, and also by the plans filed.

The reference was before three arbitrators, and the award was executed by two of the three only. It appeared that at a meeting of the arbitrators a rough sketch of the award was drawn up and read over to them, and was agreed to and signed by two of them, but dissented from by the third; and on the following day the formal award in the terms of the draft was drawn up and signed by the two, without reference to the dissenting arbitrator.

Held, under sec. 9, sub-sec 17 of the Railway Act, 1868, that the award was invalid; and, *semble*, it would be so apart from that Act.

Held, also, before suing for compensation awarded for land taken, a conveyance thereof must be tendered or a readiness and willingness to execute one be averred.

Held, also, that the Act vests the land in the company, and not merely an easement or right of way over the roadway.

To the action the defendants pleaded an equitable plea of satisfaction and discharge, by payment into

Court, under the statute, of \$683.89 being the amount found due for compensation.

Quere, whether the plea must be treated as an ordinary plea of payment into Court in the cause, or a payment merely for the person entitled to the money. If the former, it admitted the plaintiffs cause of action *pro tanto*; but in such case the amount so paid in is considered as struck out of the declaration, and so treating it here, a nonsuit was directed to be entered.—*Anglin v. Nickle et al.*, 72.

2. *Attempting to get on train in motion—Striking against truck on platform—Accident—Negligence—Contributory negligence.]*—The plaintiff an intending passenger by a way train on the defendant's railway, arrived at the station just as the train, which was some minutes late, was moving out of the station, whereupon he ran quickly to the train, and seizing hold of the iron railing of one of the cars, and holding thereon, ran along the platform at the speed of the train with his face towards the car, and after the train had moved a certain distance in attempting to jump thereon he struck against a baggage truck which was close to the edge of the platform, and which had been used in taking baggage to the baggage car, and was left for a couple of minutes to bring back the baggage therefrom. By the concussion he was thrown under the wheels of the train and received an injury to one of his legs which rendered amputation necessary.

Held, under the circumstances, more fully set out in the case, the leaving of the truck on the platform did not constitute negligence on the part of the defendants; but, even if

it did, the plaintiff in attempting to get on the train, as he did, was guilty of such contributory negligence as would prevent his recovering.—*Haldan v. Great Western R. W. Co.* 89.

3. *Railway Companies—Compensation for lands taken—C. S. C. ch. 66.]*—In an action against defendants, a railway company, for compensation for land taken by them and interest thereon, it appeared that in 1874, defendants, without giving any notice or taking any proceedings for acquiring the land under the Railway Act, C. S. C. ch. 66, entered upon it and proceeded with the construction of the railway. No settlement was made, though the plaintiff frequently demanded compensation, until 1878, when on his threatening to proceed against the company, the president, being authorized by the board, instructed the secretary to make a settlement, and he, after seeing the plaintiff, valued the land at \$1,775, allowing six per cent interest from the time the land was taken, making in all \$2,199, which the plaintiff agreed to accept. The valuation was shewn to the president, who expressed no dissent, and the written memorandum thereof was given to the plaintiff, and a copy placed among the records of the company. No resolution of the board was passed in regard to the valuation, and no formal contract drawn up, but the valuation was before the board when making the contract for the completion of the road. It was also proved that the plaintiff tendered a conveyance of the land to the company, and their only objection thereto was, that they were unable to pay the money.

Held, under the circumstances,

that the plaintiff was entitled to recover the amount of the compensation agreed upon, and the interest.—*Starling v. Grand Junction R. W. Co.*, 247.

See PRINCIPAL AND SURETY.

REASONABLE AND PROBABLE CAUSE.

See MALICIOUS ARREST.

REASONABLE CONDITIONS.

See INSURANCE, 2, 4.

REASONABLE TIME.

See BANKS, 2.

REDEMISE.

Absence of clause of from mortgage.]—See CHATTEL MORTGAGE, 2.

REDEMPTION.

Action for preventing mortgagor redeeming.] See CHATTEL MORTGAGE, 2.

REGISTRY LAWS.

*Evidence—Registry Act—Mortgage—Certificate of registration—Proof of execution.]—Held, that the production of the registered duplicate original of a mortgage with the registrar's certificate endorsed thereon is *prima facie* evidence of the due execution of such instrument.—*Canada Permanent Loan and Savings Co. v. Page*, 1.*

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REMUNERATION.

Change in mode of—Discharge of surety.]—See PRINCIPAL AND SURETY, 1.

See POLICE MAGISTRATE.

REPRESENTATION.

See FRAUD—INSURANCE, 6.

ROAD.

See WAYS.

RULE NISI.

Form of.]—See JUSTICE OF THE PEACE, 1.

RULES OF COURT.

Tariff of fees—Arguments of rules nisi, &c.]—627.

SALARY.

See PRINCIPAL AND SURETY, 1—POLICE MAGISTRATE.

SALE OF GOODS.

Proof of contract—Parol evidence—Price—Time—Inspection of goods—Agency—Equitable defence—Damages.]—Where a contract is to be made out from letters and telegrams, it is not essential that each should refer in terms to the preceding one, but the connection may be made out even from the subject matter of the correspondence, so long as it appears that all relate to the same contract.

On 30th August, 1879, the plaintiff telegraphed to the defendant : "Quote price for August cheese, and number of boxes, to which defendant replied, "six cents." The plaintiff telegraphed : "Your offer of August cheese at six cents accepted." On 8th September, defendant wrote to plaintiff : "When will you inspect and ship ? We will ship at Lucknow and Wingham about 700 August. * * * Will expect you to inspect and ship in the usual time, say middle of month." On the 11th September, plaintiff replied that he would ship "next week," (which ended on 20th September). On 15th September, plaintiff again wrote, asking defendant, "When will it be convenient for you to ship your August cheese, and at what stations. Please let me know at once, as we would not want to ship later than Monday or Tuesday of next week. On the 18th September, defendant replied that he had already informed him of the stations, "and we were expecting to ship this week." On the 19th, plaintiff wrote requesting delivery at the places named on Wednesday (which would be the 24th). The defendant afterwards refused to deliver the cheese, and this action was brought for non-delivery.

Held, that from the telegrams and letters, read in the light of the parol evidence, set out in the case, the surrounding circumstances, and the position of the parties, a valid contract was established for the sale of 700 boxes of cheese at six cents per lb.; that the price mentioned was not indefinite, it being shewn that cheese was always put up in boxes, of an average weight, and sold at so much per lb.

Held, also, that even though ins-

pection might be a term of the contract this was chiefly for the plaintiff's protection, and he might waive it, as he did by his letter of the 19th September.

Held, also, that even though the defendant acted merely as agent of certain cheese factories, he contracted in his own name without qualification, and was therefore personally liable.

It was urged that time was of the essence of the contract, and that the plaintiff should have proved a readiness to accept by the time stipulated, which defendant contended was 20th September; but, *Held*, that the evidence shewed that time was not intended to be so considered; that the contract was only for delivery within the usual time, and that if delivery by the 20th was a condition precedent, it was waived by defendant's letter of the 18th.

Held, also, that in the absence of any joint contract by plaintiff with the several cheese factories, his proceeding against one of them for the amount they had to deliver, and settling with it, did not preclude him from now suing defendant for damages for the residue of the cheese not delivered.

Held, also, that the fact of plaintiff having contracted to re-sell to a third person, would not limit his damages to the price agreed upon on such re-sale, though less than the market price.—*Ballantyne v. Watson*, 529.

See INSOLVENCY, 1.

SCHOOLS.

See INSURANCE, 3.

SCI. FA.

See CORPORATIONS.

SECURITY.

Valuing.]—See INSOLVENCY, 4.

SEIZURE.

See CHATTEL MORTGAGE, 2—INSURANCE, 2.

SERVANT.

See MASTER AND SERVANT.

SERVICE.

Personal.]—See FOREIGN LAW.

SHERIFF.

County board of auditors—Audit of.]—To an action for the recovery of fees for services connected with the administration of justice within defendants' county, claimed to have been rendered by the plaintiff as sheriff, alleging that such fees had been duly audited by the county board of auditors under the statute, whereby the plaintiff became entitled to receive payment of the same, the defendants pleaded on equitable grounds, setting up that the right to such fees had been disputed and submitted to the Court of Queen's Bench, by a special case, and that the alleged audit was made under a misconception of the judgment which the auditors erroneously understood to decide that the plaintiff was entitled to such fees, whereas the decision was to the contrary.

*Held, affirming the judgment of Cameron, J., plea good, for that the facts stated therein would constitute a good defence to the action, because it appeared that the fees had not been duly audited, and this was a pre-requisite to the plaintiff's right to recover.—*Reynolds v. Corporation of Ontario*, 14.*

SHARES.

See CORPORATIONS.

SHIPPING.

See INSURANCE, 8—MASTER AND SERVANT.

SLANDER.

See DEFAMATION.

SPECIAL DAMAGE.

See DEFAMATION, 2.

SPECIFICATIONS.

Requirements of.]—See BRIDGE.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTE OF USES.

See CROWN PATENT.

STATUTES, CONSTRUCTION OF.

4 Wm. IV. ch. 1, secs. 17, 24.]—See LIMITATIONS, STATUTE OF, 2.

C. S. U. C. ch. 42.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.

C. S. C. ch. 66.]—See RAILWAYS, 3.

27 & 28 Vic. ch. 23, D.]—See CORPORATIONS.

27 & 28 Vic. ch. 29, sec. 3.]—See LIMITATIONS, STATUTE OF, 2.

31 Vic. ch. 12, sec. 29, D.]—See BRIDGE.

32 & 33 Vic. ch. 13, D.]—See INSOLVENCY, 3.

32 & 33 Vic. ch. 20, sec. 47, D.]—See CRIMINAL LAW, 1.

32 & 33 Vic. ch. 70, D.]—See INSURANCE, 6.

33 & 34 Vic. ch. 20, sec. 60, D.]—See CRIMINAL LAW, 2.

36 Vic. ch. 8, O.]—See ARBITRATION, 1.

37 Vic. ch. 10, sec. 5, D.]—See PARLIAMENT.

37 Vic. ch. 60, sec. 5, D.]—See PARLIAMENT.

38 Vic. ch. 10., sec. 2, D.]—See PARLIAMENT.

38 Vic. ch. 16, sec. 133, D.]—See INSOLVENCY, 1, 4.

40 Vic. ch. 72, D.]—See INSURANCE, 6.

41 Vic. ch. 8, sec. 7, O.]—See LIMITATIONS, STATUTE OF, 1.

41 Vic. ch. 18, sec. 1, D.]—See CRIMINAL LAW, 1.

R. S. O. ch. 5, sec. 3.]—See JUSTICE OF THE PEACE, 2.

R. S. O. ch. 49,]—See ARBITRATION, 1.—LIMITATIONS, STATUTE OF, 1.

R. S. O. ch. 72, sec. 6.]—See JUSTICE OF THE PEACE, 2.

R. S. O. ch. 71, sec. 7.]—See JUSTICE OF THE PEACE, 1.

R. S. O. ch. 76, Sec. 1.]—See JUSTICE OF THE PEACE, 3.

R. S. O. ch. 116, secs. 2, 3.]—See PRINCIPAL AND SURETY, 2.

R. S. O. ch. 172, sec. 1.]—See POLICE MAGISTRATE.

R. S. O. ch. 174, sec. 412,]—See POLICE MAGISTRATE.

R. S. O. ch. 204, sec. 87, sub-sec. 7.]—See INSURANCE, 3.

R. S. O. ch. 205, sec. 3]—See INSURANCE, 3.

STATUTORY CONDITIONS.

See INSURANCE, 1, 4.

STOCK.

See CORPORATIONS.

STOVES.

See INSURANCE, 4.

STREET.

See WAYS.

SUBMISSION.

See ARBITRATION.

SURETY.

See PRINCIPAL AND SURETY.

SURPLUSAGE.

See DEED, 2.

TARIFF OF FEES.

See RULES OF COURT.

TENANTS IN COMMON.

See JUSTICE OF THE PEACE, 1—LIMITATIONS, STATUTE OF, 2.

TENDER.

Of money.]—See BANKS, 2.

Of deed.]—See RAILWAYS, 1, 3—

TIME.

See SALE OF GOODS.

TITLE.

See INSURANCE, 2, 4.

TOWNS.

See POLICE MAGISTRATE.

TRESPASS.

See CHATTEL MORTGAGE, 2.

TROVER.

See BILLS OF LADING—CHATTEL MORTGAGE, 2,

ULTRA VIRES.

See INSURANCE, 6.

VESSEL.

See INSURANCE, 8—MASTER AND SERVANT.

VOTE.

Right of councillor to vote when interested.]—See WAYS, 1.

WAREHOUSE RECEIPT.

See BILLS OF LADING.

WARRANT.

Proof of.]—See MALICIOUS ARREST.

WARRANTY.

See INSURANCE, 4.

WATER.

Deed—Water's edge at low water mark—Ad medium filum aquæ—Proviso restricting to water's edge—Possession.]—In ejectment the defendant claimed under two deeds to P. and N. respectively. In the deed to P. the land was described as “commencing on the verge of the river Moira at low water mark;” and then, after describing the first two courses, the third course was stated to be “to the water's edge of the said river at low water mark,” and it concluded, “and thence down with the winding of the said river to the place of beginning.”

*Held, that the particular limitation must be construed specifically as stated, so that the land must be deemed to extend merely to the low water mark, and not *ad medium filum aquæ*.*

In the deed to N., which was of the land adjoining, the description was: “ Commencing at the northwest corner of P.'s lot, *i. e.*, the point at which the third course of P.'s grant terminated, namely, the water's edge of the river Moira at low water mark,” and from that starting point, after describing the first two courses, the third course was, “to the water's edge of a small inlet or bay”; and after describing the fourth course, namely, “and thence along the water's edge to the place of begin-

ning," there was added the following proviso: "With the privilege of extending any building or buildings fifteen feet from the water's edge, providing the same does not obstruct or diminish the width of a small inlet or bay in the rear of said lot intended for bringing saw logs therein."

Held, that the effect of the proviso was to limit the boundary of the lot strictly to the water's edge of the small inlet or bay.

A claim of possession set up by the defendant to the land in question, except as to fifteen feet thereof, which on the evidence the defendant was entitled to, was decided against him.—*Coleman v. Robertson et al.*, 609.

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WAYS.

1. *Municipal corporations—By-law closing up road—Application to quash—Notice—Proof of by-law—Private way—Compensation—Right of councillor interested to vote.]*—On an application to quash a by-law closing up a road, the applicant's affidavit stated that in compliance with his request therefor he received from the township what purported to be a copy of the by-law with the following certificate thereon: "Verified a true copy," which was signed by the clerk and under the corporate seal, but the by-law was not stated to have been signed by the reeve or other proper officer, or to be under the corporate seal.

Held, by OSLER, J., that this was sufficient proof of the by-law under sec. 322 of the Municipal Act, it not being essential to shew that the by-law was signed by the reeve, &c., under the corporate seal, and that if the corporation intended to rely on

this objection the onus was upon them to substantiate it.

Held, also, that it was not open to the applicant to object that the road in question was a private way over one C.'s land, because the applicant himself had treated it as a public highway, and had caused C. to be convicted several times for obstructing it.

Held, also, that the evidence, set out in the case, shewed that the applicant had due notice of the intention to pass the by-law.

Held, also, following *McArthur and Corporation of Southwold*, 3 App. 298, that the deprivation of the use of the road by the applicant, if the by-law had that effect, was a subject for compensation only, which need not be provided for in the by-law.

It appeared that the only persons interested in the maintenance or closing of the road were the applicant and C. who was instrumental in having it passed. The township council consisted of five members, of whom C. was one, the concurrent votes of three of whom was necessary to the passage of a by-law. The by-law here received three votes, including C.'s.

Held, that the by-law could not be upheld, for that C.'s interest in its passage, which was apart from that of the public, disentitled him from voting.

Held, also, that it was objectionable as being passed to serve private interests, and not *bona fide* in the interests of the public.—*Re Vashon and Corporation of East Hawkesbury*, 194.

2. *Ditches—Necessity to fence or grade—Accident—Negligence.]*—In action by plaintiff for damages

sustained by him by reason of his horse and buggy falling into a ditch by the side of a county road known as the Kingston Road, it appeared that the road, which ran east and west, was 59 feet wide between the fences, and the actual travelled part between the ditches being 30 feet, the southerly 10 feet of which extending to and 18 inches of the ditch in question was macadamized. The ditch was about 4 feet wide at the top sloping to about $2\frac{1}{2}$ feet at the bottom, and its depth from the edge of the ditch was 15 inches, from the extremity of the macadamized part $22\frac{1}{2}$, and from the crown of the road 28 inches.

Held, that the plaintiff could not recover, for that the having such a ditch without guards or railings, or without slanting the roadway to the bottom of the ditch so that the plaintiff could drive into it without upsetting, was no evidence of neglect on the defendants' part to keep the road in repair,

Held, also, on the evidence, set out in the case, that there was no contributory negligence on the plaintiff's part.—*Walton v. Corporation of York*, 217.

3. *Obstruction by wrongdoer—Depositing ashes on street—Notice.*—One S., contrary to the city by-laws, deposited on one of the streets of the city of Toronto, to be removed by the city scavenger carts on the following morning, a quantity of ashes and rubbish so as to cause an obstruction to the street, whereby plaintiff, while driving along the street a few hours afterwards, at one o'clock in the morning, was injured. It was proved that the defendants had no express notice or knowledge of the obstruction until after the accident, but it was urged that no-

tice must be implied, because that the defendants had sanctioned the practice of so depositing ashes, &c., by having permitted it without objection on former occasions, but the evidence was held not to substantiate this.

Held, there was no evidence of negligence on defendants' part, and a nonsuit was entered.—*Ayre v. Corporation of Toronto*, 225.

Accident—Negligence.]—See NEW TRIAL—BRIDGE.

WHARFAGE.

See BILLS OF LADING.

WIFE.

See HUSBAND AND WIFE.

WILD LAND.

See LIMITATIONS, STATUTE OF, 2.

WORK AND LABOUR.

Architect's certificate—Wrongful dismissal—Notice—Amendment—A. J. Act.]—A building contract provided that in case the works were not carried on with such expedition, and with such materials and workmanship as the architect might deem proper, then, with the special and written authority of the proprietor, he should be at liberty, after giving him seven days' notice in writing, to dismiss the contractor, and employ other persons to finish the works, &c.: Held, 1. That such special authority meant an authority to be acted upon with reference to some

individual contractor, and not a general power to dismiss at the architect's direction. 2. That the notice should intimate to the contractor in what respect the architect was dissatisfied, and what he required to be done, so that during the time mentioned in the notice the contractor might have an opportunity of removing the objections, in default of which the architect might dismiss him at the expiration of the time, but not before. *Quære*, whether such provision could be acted upon after time fixed by the contract for the completion of the work.

It was also provided that the architect might dismiss any workman disapproved of, and reject any materials deemed unfit, &c. : *Held*, that this clearly applied to the case of a workman as distinguished from a contractor.

The plaintiff having sued upon the common counts, produced no certificate from the architect, without which, under the contract, no payment was to be made. The dismissal of the plaintiff in exercise of

the supposed power given by the contract had been set up by defendant as a defence, and all the evidence given upon it at the trial which could be produced. The Court under these circumstances, allowed a count to be added in term, claiming for a wrongful dismissal, by reason whereof he was prevented from obtaining such certificate, and entered a verdict upon it for the amount remaining unpaid upon the contract price.—*Smith v. Gordon*, 553.

WORDS, MEANING OF.

“*Corrupt bargain.*”]—See PARLIAMENT.

Noxious thing.]—See CRIMINAL LAW, 2.

Purely money demand.]—See PRINCIPAL AND AGENT.

WRONG-DOER.

Obstruction by.]—See WAYS, 3.

